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HARVARD

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT

BY

JOHN W. REDMOND.

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JUDGES

OF THE

SUPREME COURT OF VERMONT

DURING THE TIME OF THESE REPORTS.

HON. JOHN W. ROWELL, CHIEF JUDGE.

HON. JAMES M. TYLER.

HON. LOVELAND MUNSON.

HON. HENRY R. START.

HON. JOHN H. WATSON.

HON. WENDELL P. STAFFORD,

Resigned June 7, 1904.

HON. SENECA HASELTON.

HON. GEORGE M. POWERS,

Appointed June 7, 1904.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF VERMONT.

HENRY J. POLLARD *v.* WESLEY BARROWS and WILLIAM CAPRON.

May Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 8, 1904.

Reference—Effect—Exceptions to Report—Evidence—Pleading—Amendment.

When the referee submits to the court the question whether certain evidence is inadmissible simply because it tends to show trespasses other than those described in the declaration, and there is no claim that it is otherwise inadmissible, the court will consider the question, though no exceptions are filed to the report.

When a case is referred, it is the *cause* of action that is referred, and all questions of variance between the declaration and the proof are waived by the reference.

An amendment must be refused only when it changes the form of action, or introduces a new cause of action.

In an action of trespass, when the case is referred, and the defendants know that the question is whether they have cut timber on that part of plaintiff's land where they had a license to cut, or on an-

other part thereof, the referee properly admitted evidence of trespasses on a different part of plaintiff's close than that described in the declaration.

In an action of trespass, when the case had been referred, and the referee reported that defendants committed no trespass on that part of plaintiff's land described in his pleadings, but did trespass upon another part thereof, the court properly allowed an amendment which made the description of the land trespassed upon correspond with the findings in the report.

TRESPASS QUARE CLAUSUM to recover treble damages, under V. S. 5020, for cutting timber. Pleas, the general issue, and *liberum tenementum*. Replications, *similiter*, and new assignment. Rejoinders, not guilty, and license; surrejoinder, traversing the plea of license, and joining issue on the plea of not guilty. Heard on a motion to amend the new assignment, and on the report of a referee, at the December Term, 1903, Windsor County, *Munson,* J., presiding. Motion granted, and judgment on the report for the plaintiff. The defendant excepted.

The misdescription in the new assignment resulted from an error in giving the points of compass locating the point begun at, and for the courses and distances. The opinion states the other facts.

Charles Batchelder for the defendants.

There was no need of filing exceptions to the report in order to properly bring before the court the question of the admissibility of the evidence before the referee. *Walton* v. *Walton's Est.*, 63 Vt. 515; *Wiley* v. *Laraway*, 64 Vt. 559.

Upon a reference, an amendement is never treated as having been made, if such amendment would introduce a new cause of action, and this amendment would do that. *Waterman* v. *R. Co.*, 30 Vt. 610; *Chaffee* v. *Rutland R. Co.*, 71 Vt. 384; *Daley* v. *Gates*, 65 Vt. 591; *Swerdferger* v. *Hopkins*, 67

Vt. 136; *Bowman* v. *Stowell,* 21 Vt. 314; *Carpenter* v. *Gookin,* 2 Vt. 495.

F. C. Southgate for the plaintiff.

No exceptions to the report having been filed, all objections and exceptions to the admissibility of testimony are waived. *Manning* v. *Leighton,* 66 Vt. 56; *Wilder* v. *Stanley et al.,* 49 Vt. 105.

If the description is not sufficient it was remedied by the reference. *Waterman* v. *R. Co.,* 30 Vt. 610; *Lyndon Granite Co.* v. *Farrar,* 53 Vt. 585; *Dennis* v. *Stoughton,* 55 Vt. 371; *White's Est.* v. *White's Est.,* 69 Vt. 360; *Windham Prov. Inst.* v. *Sprague et al.,* 43 Vt. 502; *Spaulding* v. *Warren,* 25 Vt. 316; *Hicks* v. *Cottrill,* 25 Vt. 80.

The court had power to allow this amendment. *Lycoming Fire Ins. Co.* v. *Billings,* 61 Vt. 310; *Haskins* v. *Ferris,* 23 Vt. 673; *Bowman* v. *Stowell et al.,* 21 Vt. 309; *Stevens* v. *Hewitt,* 30 Vt. 262; *Eddy* v. *Sprague,* 10 Vt. 216; *Trescott* v. *Baker,* 29 Vt. 459; *Cook* v. *Carpenter et al.,* 34 Vt. 121; *Boyd* v. *Bartlett,* 36 Vt. 9.

TYLER, J. This action is brought to recover treble damages of the defendants, under V. S. 5020, for their alleged cutting of timber upon the plaintiff's close. The case comes to this Court upon a question submitted by the referee and upon an exception allowed the defendants to the action of the court below in granting the plaintiff's motion to amend his replication and new assignment, which motion was made after the referee's report was filed, and to the rendering of judgment for the plaintiff on the report after the amendment.

In the original declaration the premises upon which the trespasses were alleged to have been committed are only

described as the plaintiff's close situated in the town of Bridgewater. The defendants pleaded not guilty and that said close was their own. The plaintiff filed a replication and a new assignment, bounded the close, and alleged that it was a different close from the one mentioned in the defendants' second plea. The defendants pleaded not guilty and a license from the plaintiff to commit the acts alleged in the new assignment as trespasses. The plaintiff traversed the defendants' plea of license and joined issue upon the plea of not guilty.

The referee found that the plaintiff had good title to the farm described in his declaration, that he had occupied it more than twenty years, and that it included the land mentioned in his declaration and all the land upon which it appeared that any cutting of timber had been done by the defendants or either of them.

It is found that prior to the trespasses the plaintiff sold to the defendants by contract the standing timber upon twenty-five acres of his farm, giving a description of the land, but it is further found that: "This description does not correspond to the land upon which the defendants had been cutting, and is not a description of the land upon which the timber sold by the plaintiff to them then stood."

The plaintiff made a wrong description, in his new assignment of the land trespassed upon, for the referee finds that the defendants cut no timber upon the land described by the plaintiff in his replication. But he finds that: "The defendants did cut timber growing on the plaintiff's land without the leave of the plaintiff, who was the owner thereof, not acting through any mistake; and neither of them had any reason to believe that the timber so cut by them was on the

land upon which they, or either of them, were permitted to cut."

It therefore appears that the plaintiff's evidence did not tend to support his replication, and it was received subject to the defendants' objection and exception.

The referee states that: "After the evidence was closed the plaintiff gave notice of a motion for leave to amend his replication by changing the names of points of compass therein so that the description should correspond with that of the premises upon which his evidence tended to show the trespasses to have been committed by the defendants."

1. The referee submitted to the court all questions of law arising on the reception of evidence, thus making the correctness of his findings dependent upon the decision of the court.

The case presented is that the trespasses were committed upon the plaintiff's farm mentioned in his declaration; that in his new assignment he misdescribed the land upon which the trespasses had been committed, and that the defendants were not surprised by the plaintiff's evidence as to the place where the cutting was claimed to have been done.

The plaintiff contends that the case is not before this Court because the defendants filed no exceptions to the report. If the defendants had claimed that improper evidence was admitted by the referee, exceptions to the report should have been filed and a transcript of the testimony brought up, so that the court below could have decided the question of its admissibility. *Graham* v. *Stiles*, 38 Vt. 578. But here the defendants do not claim that the evidence was inadmissible otherwise than that it did not relate to trespasses upon any land described in the replication. It was in this view that the referee submitted to the court the question

whether the plaintiff's evidence in respect to the alleged trespasses was admissible under his declaration and replication.

2. The evidence was admissible. It is the settled rule in this State that it is the *cause* of action that is referred, and that all questions of variance between the declaration and the proof are waived by the reference. Rob. Dig. 600, pl. 5 and 6. It is disallowed only when the amendment changes the form of action, or introduces a new cause of action. Rob. Dig. 600, pl. 7; Rob. Dig. Sup. 250, title, Pleadings; *Walton* v. *Walton's Estate,* 63 Vt. 513, 22 Atl. 617; *White's Estate* v. *White's Estate,* 69 Vt. 360, 37 Atl. 1114.

In this case the cause of action was tried by the referee; the defendants knew that the only question was whether the cutting of timber was done by them upon lands where they had license by their contract to cut, or upon another part of the plaintiff's close, so that they were placed at no disadvantage; and it is clear that the misdescription could have been cured by an amendment. These facts bring the case within the rule laid down in the cases cited. There was no error in the allowance of the amendment which made the description of the land trespassed upon conform to the finding in the report.

Judgment affirmed.

TERRANCE McKANE *v.* MARR & GORDON.

January Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, and WATSON, JJ.

Opinion filed August 22, 1904.

Master and Servant—Dangerous Employment—Assumed Risk—Assurance of Foreman.

In an action for injuries received by the plaintiff from the explosion of powder in a drill hole which had been fired without lifting the rock, and from which, as the servant of the defendants, and by direction of their foreman, he was removing the tamping, when the evidence tends to show that the plaintiff was an experienced quarryman, and that, when tamping is not blown out, it is impossible for anyone to say with certainty that the charge is exploded, and that the methods used in drawing tamping are adopted in recognition of this uncertainty; this evidence tends to show the existence of a known risk, ordinarily incident to the work, and which the plaintiff assumed in undertaking it, and entitles the defendants to a charge on the doctrine of assumed risks, without regard to whether, as a prudent man, plaintiff had reason to believe that powder was there, and though the foreman had assured him that the charge had exploded.

CASE for personal injuries. Plea, the general issue. Trial by jury at the March Term, 1903, Washington County, *Stafford,* J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

Senter & Senter and *W. A. Lord* for the defendant.

The master is not liable for an injury sustained by his servant in the course of his employment, when the danger is of such a character that it must be as apparent to the servant as to the master, or when it is such that it could not be ascertained by either in the exercise of reasonable care and prudence. 1 Bailey Personal Injury, § 785.

The charge ought not only to be correct, but to be so adapted to the case, and so explicit, as not to be misconstrued or misunderstood by the jury. Profatt Jury Trials § 313.

Nothing is said in the charge regarding the ordinary, obvious risks of the dangerous business in which plaintiff was employed. Beach Contrib. Neg. 370.

M. M. Gordon and *Richard Hoar* for the plaintiff.

Accident did not result from a risk which plaintiff assumed. He hired out as a plug driller, and he assumed only such risks as are incident to that line of work. The handling of powder was not one of these. A servant does not assume the risk of hidden defects. Bushwell Personal Injuries (2 Ed.) § 206.

The plaintiff was not employed for this service, and the defendants violated their duty in putting him at this perilous service without warning, especially after the foreman had assured him that the powder had exploded. *Lefrans* v. *N. Y. etc., Co.*, 130 N. Y. 658; *Dumas* v. *Stone*, 65 Vt. 442; *Malcolm* v. *Fuller*, 152 Mass. 167.

MUNSON, J. The plaintiff received his injuries while working for the defendants in their granite quarry, under the general direction of the foreman of the quarry, one O'Hearn. He was sent by O'Hearn to remove the tamping from some drill-holes which had been fired the night before without lifting the rock; and his evidence tended to show that O'Hearn assured him that the charges had exploded, and gave his reasons for saying so. There was powder in one of the holes, which exploded while the plaintiff was at work on the tamping.

The court charged the jury, in substance, that the plaintiff was entitled to recover if O'Hearn told him that the

powder had exploded, and he believed and relied upon the statement, and as a careful and prudent man had no reason to believe otherwise. The defendants excepted to the failure of the court to instruct the jury upon the subject of assumed risks.

The plaintiff assumed more than the duty of taking ordinary care for his safety. He assumed the risk of known and obvious dangers ordinarily incident to his employment, including the risk of dangers that could not be detected nor avoided by ordinary care. He could not relieve himself from this burden by relying on the assurances of the foreman in a matter regarding which he knew or ought to have known that the foreman had no superior knowledge. If the evidence afforded a basis for the claim that the plaintiff knew or ought to have known that O'Hearn had no superior knowledge regarding the situation, and that an unexploded charge might be under the tamping whatever the indications to the contrary, the defendants were entitled to a charge upon this subject.

There was evidence tending to show that the plaintiff was an experienced quarryman, accustomed to all kinds of quarry work; that when a blast is unsuccessful many conditions and indications are to be considered in determining whether the explosion covered all the charges; that when the tamping of a hole is not blown out it is impossible for anyone to say with certainty that the charge has exploded; and that the methods used in drawing the tamping are adopted in recognition of this uncertainty. This was evidence tending to show the existence of a known risk, ordinarily incident to the work, which the plaintiff assumed in undertaking it; and entitled the defendants to a charge upon the doctrine of assumed risks. As regards this doctrine, the question

was not whether the plaintiff as a prudent man had reason to believe that the powder was there, but whether the conditions were such that the risk involved in the chance of its being there rested upon him.

Judgment reversed, and cause remanded.

STATE *v.* EDWARD CLARK.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

Opinion filed August 26, 1904.

Criminal Law—Assault with Intent to Ravish—Age of Consent—No. 118, Acts 1898—Evidence—Tendency—Argument of Counsel.

In a prosecution for an assault with intent to ravish a girl under the age of sixteen years, evidence tending to show the facts recited in the opinion tends to support the charge.

Because of No. 118, Acts of 1898, in a prosecution for an assault with intent to ravish a girl under the age of sixteen years, the question of her consent is immaterial.

The appearance of a witness on the stand may always be considered by the jury, and counsel may properly argue concerning it.

INDICTMENT for an assault with intent to ravish a girl under the age of sixteen years. Plea, not guilty. Trial by jury at the September Term, 1903, Washington County, *Haselton,* J., presiding. Verdict guilty; and judgment thereon. The respondent excepted.

Besides the facts stated in the opinion, the evidence of the State tended to show that respondent induced the girl to go with him to an engine house; that the assault was made there; that respondent had a bottle of intoxicating liquor and drank therefrom himself in the engine house, and passed the bottle to the girl and invited her to drink.

M. M. Gordon for the respondent.

No conviction can be had if the girl consented. Hughes Crim. Law Proced. § 306; *R.* v. *Cockburn,* 3 Cox. C. C. 543; *State* v. *Peckett,* 11 Nev. 255; *Reg.* v. *Roadley,* 14 Cox C. C. 463; *State* v. *Smith,* 12 Ohio 466.

John H. Senter, State's Attorney, for the State.

The mere submission of a child in the power of a strong man is not consent. *State* v. *Cross,* 12 Iowa 70; *Reg.* v. *Doy,* 38 E. C. L. 306; 2 Bish. Crim. Law, § 35; *Clive* v. *State,* 45 N. J. Law 47.

Under No. 118, Acts 1898, the question of consent is immaterial. *State* v. *Wheat,* 63 Vt. 673; *Davis* v. *State,* 47 N. W. Rep. 854, 34 Neb. 558; *Comer* v. *State,* (*Tex.*) 20 S. W. Rep. 547; *People* v. *Gordon,* 99 Cal. 227; *State* v. *Johnson,* 76 N. C. 211; *State* v. *Handy,* 4 Har. (Del.) 467; *State* v. *Smith,* 33 Atl. 442; *Fizell* v. *State,* 25 Wis. 368; *People* v. *McDonald,* 9 Mich. 152; *Porter* v. *People,* 158 Ill. 372; *Hanes* v. *State,* 155 Ind. 121; *State* v. *Sullivan,* 68 Vt. 543.

WATSON, J. The respondent, a person over the age of sixteen years, was tried upon an indictment charging him with assault with intent to carnally know a female person under the age of sixteen years.

The evidence tended to show that the respondent pulled the girl over, laid her down on the ground, and got on top of her; that he unbuttoned his trousers in front and after they were so unbuttoned he took her hand and tried to have her put it on his person; that he then had a knife in his hand and told her if she did not put her hand in his trousers he would kill her; and that he put his hand under her clothes. This with other evidence in the case tended to show an assault by the respondent upon the girl with intent to have sexual intercourse with her. Whether such was his intent was properly submitted to the jury.

Since the person assaulted was under the age of sixteen years, the question of her consent was immaterial. Acts of 1898, No. 118, Sec. 1; *State* v. *Sullivan,* 68 Vt. 540, 35 Atl. 479.

Counsel for the State argued to the jury regarding the girl's appearance when being examined in court, saying that "the recollection of those terrible moments down there still brings tears of shame to her face." This was held to be legitimate, to which the respondent excepted.

The appearance of a witness on the stand may always be taken into consideration by the jury. Consequently counsel may properly argue concerning it.

Judgment that there was no error in the court below, and that the respondent take nothing by his exceptions.

AGEL & LEVIN *v.* F. R. PATCH MFG. CO.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 26, 1904.

Contracts—Modification—When Binding—Consideration.

When a party to a valid contract, having broken it, consents to perform on terms more favorable to himself, however it may be while the modified contract remains executory, after it is performed by the party in whose favor it was modified, it becomes binding on both parties, unless it appears that such was not their intention.

The plaintiffs, by correspondence, sold to the defendant a car of scrap iron at $18 per net ton delivered at Rutland, and after shipment, but before delivery, the defendant refused to take the iron at that price, whereupon the parties verbally altered the contract by fixing the price at $18 per gross ton, and thereupon the defendant took the iron and paid for it at the latter price. *Held*, that, as the new agreement had been acted upon by the parties and fully performed by the defendant, the plaintiffs cannot now enforce the original agreement without injustice to the defendant.

GENERAL ASSUMPSIT to recover a balance claimed to be due on a car of scrap iron. Pleas, the general issue, payment, and accord and satisfaction. Trial by court in the City Court of the city of Burlington. *Hawkins*, Judge. Judgment for the defendant. The plaintiff excepted.

The exceptions state that, "the evidence in the case showed that the iron was shipped by the plaintiffs on the 3rd day of July, 1903, and arrived in Rutland on the 13th day of July 1903, and there is no dispute on this point."

The court found that the modification in question was made on the 13th day of July 1903, and prior to the delivery and acceptance of the iron, but after defendant had received

a bill of the car of iron from the plaintiff, charging the iron at $18 per net ton.

Mower & Peck for the plaintiff.

Verbal agreements without consideration are ineffectual to modify a valid contract in any material respect. *Hawley* v. *Farrar,* 1 Vt. 420; *Thurston* v. *Ludwig,* 67 Am. Dec. 328; *Jones* v. *Alley,* 4 G. Greene 181 (Iowa); *Little* v. *Rees,* 26 N. W. 7; *Marshall* v. *Ames,* 11 Ohio Cir. Ct. R. 363; *Russell* v. *Buck,* 11 Vt. 166; *Morrison* v. *Heath,* 11 Vt. 610; *Cole* v. *Shurtleff,* 41 Vt. 311; *Montpelier Seminary* v. *Smith's Est.* 69 Vt. 382; *Cobb* v. *Cowdery et al.,* 40 Vt. 25; *Ayers* v. *Chicago etc., C. Co.,* 52 Iowa 478; *Robinson* v. *Jewett,* 116 N. Y. 40; 1 Parsons Contracts, 7th Ed. 467.

At the time of the alleged modification the execution of the original contract had been entered upon by the plaintiffs, and fully performed by them. Contracts so performed cannot be modified without a consideration. Clark Cont., 609; *Brown* v. *Catawba,* 23 S. E. 253; *Tomlinson* v. *Smith et al.,* 2 Iowa 39; *Hyler* v. *Humble,* 100 Ind. 38.

Cushman & Sherman for the defendants.

The modified contract is binding and upon sufficient consideration, as the parties have acted thereunder. *Stewart* v. *Ketellas,* 36 N. Y. 388; *Munroe* v. *Perkins,* 9 Pick. 298; *Rollins* v. *Marsh,* 128 Mass. 116; *Blood* v. *Enos,* 12 Vt. 625; *Lattimore* v. *Harsen,* 14 Johns. 330.

ROWELL, C. J. The case is this, as far as necessary to be stated: The plaintiffs, by correspondence, sold to the defendant a car of scrap iron at $18.00 per net ton delivered at Rutland. After shipment but before delivery the defendant

refused to take the iron at $18.00 per net ton, whereupon the parties verbally altered the contract by fixing the price at $18.00 per gross ton, and thereupon the defendant took the iron and paid for it at the latter price. The plaintiffs now claim that the alteration was without consideration and void, and seek to recover in general assumpsit the difference between the prices.

Some courts hold that a party is not bound to perform his contract, but may break it at will and pay damages; and that, having broken it, if he consents to perform on terms more favorable to himself, he is doing that which he is not legally bound to do, and so there is a sufficient consideration for the other party's assent to those terms. Other courts hold that a party is bound to perform his contract, and consequently that there is no consideration for the other party's assent to those terms, unless there is a valid discharge of the original contract. Harriman, Cont. 70.

But however this may be while the modified contract remains executory, when it is performed by the party in whose favor it was modified, it becomes binding on both parties, and the original contract is thereby discharged, unless it appears that such was not the intention of the parties. *Rogers* v. *Rogers,* 139 Mass. 440; *Lawrence* v. *Davey,* 28 Vt. 264. It is said in *Thurston* v. *Ludwig,* 6 Ohio St. 1, 67 Am. Dec. 328, that there is a class of cases that a written contract may be altered by mere verbal agreement of the parties, which, at its inception, would have no binding force, but when acted upon by the parties till it would work a fraud or an injury to refuse to carry it out, would become binding and effective as a contract.

Even a contract under seal may be discharged by the performance of a subsequent parol agreement. Thus, in

Munroe v. *Perkins,* 9 Pick. 298, 20 Am. Dec. 475, the plaintiff, by an instrument under seal, agreed to erect a building for a price that proved inadequate, and having performed in part, refused to proceed, whereupon the defendant promised that if he would complete the work he should be paid a reasonable price for his labor and materials, and thereupon he completed the work; and it was held that having completed it on the faith of the new contract, the plaintiff could recover on the strength of it, and that the old contract was no defence. See, also, *Dearborn* v. *Cross,* 7 Cow. 48. In *Le Fevre* v. *Le Fevre,* 4 Serg. and Rawle, 241, 8 Am. Dec. 696, parol evidence was admitted to prove an alteration of the course of an aqueduct established by deed. The court said that if the agreement substituting another spot had not been acted upon, it would not have been admissible, but as the situation of the parties had been altered by acting upon it, the evidence was proper, for a party may prove by parol that after signing a written agreement the parties made a verbal agreement varying it, provided the variation had been acted upon and the original agreement cannot be enforced with a fraud upon one party.

In the case at bar the new agreement has been acted upon by the parties and fully performed by the defendant, and the original agreement cannot now be enforced without injustice to the defendant.

Judgment affirmed, with additional costs.

WRIGHT & VALLEY *v.* CREAMERY PACKAGE CO.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 26, 1904.

Bill in Equity—Demurrer—Interlocutory Decretal Order—Appeal.

If a demurrer to a bill in chancery is overruled, but the bill is not taken as confessed, there is no final decree, and hence no appeal lies.

APPEAL IN CHANCERY, Orleans County. Heard at Chambers on demurrer to the bill. *Stafford,* Chancellor. Demurrer overruled, *pro forma* and bill adjudged sufficient. The defendant appealed. At its May Term, 1904, on motion of the orators, the Supreme Court dismissed the appeal.

The demurrer which was overruled is for "that the complainants have not, in and by their said bill, stated such a case as doth or ought to entitle them to any such discovery or relief in equity as is thereby sought and prayed for, from or against this defendant; that, if the matters stated do give the complainants any cause of complaint against this defendant, the same is triable and determinable at law, and not to be inquired of by this Court."

Young & Young for the orators.

The order overruling the demurrer was not a final decree, hence this Court has no jurisdiction of the appeal. *Hill et al.* v. *Lamb et al.,* 28 Vt. 85; *Nelson et al.* v. *Brown et al.,* 59 Vt. 600; *Wilcox* v. *Wilcox,* 63 Vt. 137; *Lamoille County*

etc., Co. v. *Buck,* 69 Vt. 369; *Sheldon* v. *Clemmons,* 72 Vt. 185.

W. W. Miles for the defendants.

The issue raised by the demurrer in this case goes to the merits of the bill. If it is sustained, the bill will be dismissed and the suit ended. Unless this appeal is allowed and the questions raised by the demurrer determined before a hearing on the merits, said questions can never be heard in this Court. *Enright* v. *Amsden,* 70 Vt. 183; *Holt* v. *Daniels,* 61 Vt. 89; *Glastenbury* v. *McDonald,* 44 Vt. 450; *Wade* v. *Pulsifer,* 54 Vt. 45.

PER CURIAM. If, on the hearing of a demurrer to a bill in chancery, the demurrer is overruled, and the bill adjudged sufficient, but not taken as confessed, there is no final decree, and an appeal to the Supreme Court does not lie. The case remains in the court of chancery, to be further proceeded with. In accordance with this rule, drawn from the statutes, and recognized by the rules of court, the appeal in this case, is, on motion, dismissed.

DANA V. GRIFFIN *v.* LOUIS MARTEL and JOSEPH JONES.

May Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 26, 1904.

Landlord and Tenant—Expelling Tenant—Actual Possession—Symbolical Possession—Pleading—Trespass—Justification under Process—Trover—Order for Return of Property—Evidence—Value of Goods—Remoteness.

In trespass for breaking and entering plaintiff's store and forcibly expelling him therefrom, it is proper to charge the jury,—what the evidence on both sides shows—that at the time in question the store, which was the property of the defendant, was in the complete, actual possession of the plaintiff, who was personally in the building, that he had entered at some time before as lessee, and had since remained there with his stock and fixtures; notwithstanding the fact that the defendants' evidence tended to show that the plaintiff had given him symbolical possession by delivering to him the key of the store.

In trespass for breaking and entering the plaintiff's store and forcibly expelling him therefrom, when it appears that at the time in question the plaintiff was in the actual, complete, possession of the store, which was the property of the defendant, whose evidence tended to show that the plaintiff had surrendered to him the key of the store, the court did not err in omitting to submit to the jury the question of the surrender of possession, for the delivering of the key gave the defendant, at most, only a symbolical possession, and he must have actual peaceable possession to justify him in expelling the plaintiff with force.

In trespass for breaking and entering the plaintiff's store and forcibly expelling him therefrom, the defendants cannot avail themselves of a writ of replevin to make their entry lawful, when they have not justified under it in their pleadings.

When the defendants with force and strong hand, invade a store in the actual possession of the plaintiff, their entry is not peaceable, though made without assaulting the plaintiff, and though they are

entitled to the possession thereof; and being thus in they have no right to remain.

In trespass for breaking and entering the plaintiff's store, with a count in trespass *de bonis* for taking and carrying away his goods found therein, and a count in trover for the same goods, when the jury find that defendants broke and entered the store, and took and carried away the plaintiff's goods without his consent, it is immaterial whether there was a conversion under the count in trover.

In trespass for breaking and entering the plaintiff's store, with a count in trespass *de bonis* for taking and carrying away his goods found therein, and a count in trover for the same goods, when the plaintiff's evidence tends to show that the goods were carelessly removed by the defendants and thereby greatly damaged, it is not error for the court to deny defendants' motion for an order for a return of the goods in mitigation of damages.

The case stood in this regard as it would, had it appeared that the goods were in fact essentially injured, in which case, no return could have been ordered.

The cost of goods is some evidence of their present value; and the question of remoteness will not, ordinarily, be revised in this Court.

In trespass for breaking and entering plaintiff's store, when his motive in holding possession thereof is immaterial, it is proper to exclude the question, asked him on cross-examination, whether he did not exact a money consideration from the defendants—one of whom owned the store—for the privilege of coming in.

In an action for breaking and entering the plaintiff's store and taking and carrying away his goods found therein, it was proper to allow the plaintiff to show the value of the goods sixteen months before the taking, when they were moved into the store, as against the objection that "they were transitory and had been depleted," when the plaintiff's testimony tends to show that they remained substantially the same from that time till the taking.

TRESPASS for breaking and entering the plaintiff's store and forcibly expelling him therefrom, and for assaulting him, with a count in trespass *de bonis* for taking and carrying away his goods found therein, and a count in trover for the same goods. Plea, the general issue with notice. Trial by jury

at the September Term, 1903, Rutland County, *Munson,* J., presiding. Special verdicts, and judgment thereon for the plaintiff. The defendant excepted.

It appeared that plaintiff entered the store in question, which was the property of defendant Martel, sometime in December, 1902, as lessee of Martel; that he continued to occupy it with his stock and fixtures till the time in question. The defendants' evidence tended to show that on March 17, 1903, plaintiff surrendered the store to Martel by delivering to him the key thereof, and that thereupon Martel executed a lease thereof to one McCoy. The plaintiff claimed, and his evidence tended to show, that he gave one of the keys of the store to Martel, but not in surrender thereof. The evidence of each side showed that after the key was delivered to Martel, plaintiff still continued in the store with his stock and fixtures till he was ejected by the defendants. It appeared that on the 24th day of April 1903, about 5:30 o'clock in the morning, the defendants came to the store, accompanied by a constable who had for service a writ of replevin in favor of Martel to replevy a stove in the basement of the store. The evidence of the plaintiff tended to show that defendants were also accompanied by two truckmen with truck teams and helpers. It appeared that plaintiff was called upon to open the door and allow defendants and the constable to come in and that he refused; whereupon defendant Jones broke open the door and forced an entrance, and, the plaintiff's evidence tended to show, Jones and Martel soon after assaulted him and ejected him from the store. The defendants' evidence tended to show that Jones forced an entrance at the direction of the constable; that after they were in plaintiff told them they need not serve the writ of replevin that they could take the stove, so the writ was not

served; that plaintiff assaulted Jones, and that whatever assault was made by defendants upon the plaintiff was in self-defence; that defendants removed the plaintiff's goods simply to avail themselves of the possession of the store; that they never claimed any interest in the goods, but properly stored them subject to the order of the plaintiff. The evidence of the plaintiff tended to show that the defendants moved his goods in a careless and negligent manner whereby they were greatly damaged.

Only special verdicts were submitted, in reply to which the jury found that the constable did not authorize the defendants or either of them to break the door; that as between plaintiff and Jones, the latter committed the first assault; that as between plaintiff and Martel, Martel committed the first assault; that the defendants in entering the store had a common understanding that they would use such force as might be necessary to remove the plaintiff therefrom; that the force used by Jones was not in preventing or stopping a conflict between plaintiff and Martel; that plaintiff sustained damages in his person from all that was done to him by both defendants, in the sum of $200; that the fair value of the fixtures and stock, at the time defendants took possession of same, was $1,500; that the plaintiff did not give defendants license to remove the property.

Upon these verdicts, the court rendered judgment for the plaintiff against the defendants for $1,700, and adjudged that the cause of action arose from the wilful act of the defendants and that they ought to be confined in close jail.

Butler and Moloney for the defendants.

The defendant, Martel, was entitled to immediate possession of the store. The plaintiff was a mere intruder, and

defendant could legally expel him. *Beecher* v. *Parmele et al.*, 9 Vt. 356; *State* v. *Ross*, 69 Am. Dec. 751; *Hyatt* v. *Wood*, 4 Am. Dec. 258; *Jackson* v. *Morse*, 8 Am. Dec. 306; *Scribner* v. *Beach*, 47 Am. Dec. 265.

The evidence of defendants tended to show complete surrender by the delivery of the key. The tenant could not then dispute his former landlord's possession. Wood, Landlord and Tenant, 844; *Randall* v. *Rich*, 11 Mass. 494.

The landlord may enter and eject not only a mere intruder, but also a tenant holding without right. *Allen* v. *Kelley*, 33 Am. St. 905, (17 R. I. 731); *Low* v. *Elwell*, 121 Mass. 309; (23 Am. R. 272); *Jackson* v. *Farmer*, 9 Wend. 201; *Stearns* v. *Sampson*, 59 Me. 568; *Kellam* v. *Janson*, 17 Pa. St. 467; *Sterling* v. *Warden*, 51 N. H. 217; *Whittaker* v. *Perry*, 38 Vt. 112.

The defendants moved plaintiff's property so as to avail themselves of the possession of the store. This was no conversion. *Farnsworth* v. *Lowery*, 134 Mass. 512; *Shea* v. *Milford*, 145 Mass. 525.

If the acts of the defendants were wrongful they might be liable for damages, but not for the value of the property. *Miller* v. *Lamery*, 62 Vt. 116, 26 Am. & Eng. Enc. Law, 738.

The Court should have granted defendants' motion for an order to return the property in mitigation of damages. *Hart* v. *Skinner*, 16 Vt. 138; *Yale* v. *Saunders*, 16 Vt. 243; *R. Co.* v. *Bank*, 32 Vt. 639; *Bucklin* v. *Beals*, 38 Vt. 653; *Delano* v. *Curtis*, 7 Allen 470.

Lawrence & Lawrence, *W. K. Farnsworth*, *J. C. Baker* and *O. M. Barber* for the plaintiff.

Our statute of forcible entry and detainer prohibits an entry with force and strong hand. Even a previous surrender

to the landlord would not justify such an entry. *Whittaker* v. *Perry et al.*, 38 Vt. 107; *Mussey* v. *Scott*, 32 Vt. 82; *Dustin* v. *Cowdry*, 23 Vt. 631; *Lorimer* v. *Lewis*, 39 Am. Dec. 461; *Evil* v. *Cornwell*, 18 Am. Dec. 138.

The measure of damages was the value of the goods at the time they were taken. *Crampton* v. *Valido Marble Co.*, 60 Vt. 291, 303.

The evidence of its cost tends to show the value of property. *Rawson* v. *Elbridge*, 57 Vt. 612; *Raymond Syndicate* v. *Gutentag*, 177 Mass. 562.

The defendants had no right to an order for the return of the property. *Hart* v. *Skinner*, 16 Vt. 138; *Yale* v. *Saunders*, 16 Vt. 243; *Green* v. *Sperry*, 16 Vt. 390; *R. Co.* v. *Bank of Middlebury*, 32 Vt. 639; *Bucklin* v. *Beals*, 38 Vt. 654; *Carpenter* v. *A. B. L. Asso.*, 40 Am. St. Rep. 345; *Bolling* v. *Kirby*, 24 Am. St. Rep. 789.

ROWELL, C. J. This is trespass for breaking and entering the plaintiff's drug store, and forcibly and with strong hand expelling him therefrom, and for assaulting him, with a count in trespass *de bonis* for taking and carrying away his goods found therein, and a count in trover for the same goods.

The court charged that at the time in question the store, which was the property of Martel, was in the complete, actual possession of the plaintiff, who had entered it some time before as lessee or under some lessee, and had since remained there with his stock and fixtures, and was then personally in the building. And this was true, unless the plaintiff had surrendered possession to Martel by delivering to him the key of the store, as defendants claimed.

On this point the defendants' evidence tended to show that the plaintiff, not having paid his rent as agreed, surrendered possession by delivering the key to Martel, who

thereupon leased the store to another party; that after that, plaintiff put on a new lock, and slept in the store nights, and kept the door locked so Martel could not get in with the key he had. The exceptions expressly state that the testimony on the part of the defendants tended to show that from the time of the delivery of the key to Martel, the plaintiff was in the store, holding it against Martel, and the defendants claimed that he was a mere intruder and trespasser, and had no right there, as he had surrendered possession.

The plaintiff admitted that he gave the key to Martel, but said it was not in surrender; that he continued in possession, and changed the lock because Martel refused to let him have the key again.

The defendants claim that the court erred in not submitting the question of surrender to the jury. But that was not error, for the defendants' testimony did not tend to show that Martel had such a possession as entitled him to expel the plaintiff with force. In order to do that, he must have had actual, peaceable possession, so that he stood in the attitude of defending his own possession, and not of invading the plaintiff's possession. *Whittaker* v. *Perry*, 38 Vt. 105. But he stood in no such attitude, for the delivery of the key gave him, at most, only a symbolical possession, not the actual possession, for that continued in the plaintiff, as the testimony on both sides showed.

No general verdict was submitted, but only special findings returned, which, the defendants claim, do not alone warrant a judgment for the plaintiff, for that the defendants were there to assist their officer to replevy a stove that was in the basement of the store; that the entry was peaceable, no assault being made in effecting it, and for which damage is not claimed, nor for the detention; that as the door was

Martel's, he had a right to break it, the plaintiff not interfering, though the officers did not authorize it; that having entered peaceably, the defendants had a right to remain, and if, in order to do so, it became necessary to assault the plaintiff, it matters not that they committed the first assault, as their testimony tended to show that they used no more force than was necessary to protect themselves from bodily harm.

As to the writ of replevin, the defendants not having justified under it in their pleadings, cannot avail themselves of it to make their entry lawful. *Briggs* v. *Mason,* 31 Vt. 433; *Mack* v. *Kelsey,* 61 Vt. 399, 17 Atl. 780; *Poole* v. *Massachusetts etc., Association,* 75 Vt. 85, 53 Atl. 331. Nor was their entry peaceable within the meaning of the law, though made without assaulting the plaintiff, for it was an invasion of his possession with force and strong hand, which the statute forbids, and the question of title and right of possession is unimportant. And being in as they were, they had no right to remain, and consequently no right to assault the plaintiff in order to remain, but were bound to depart, and leave the plaintiff in his former state, and then they could have proceeded legally to get possession. *Dustin* v. *Cowdry,* 23 Vt. 631, 638.

The defendants claim that there was no conversion of the goods, for that the taking was in recognition of the plaintiff's right, with no intention of depriving him of that right for any length of time whatever. But it is not necessary to decide that question, for there certainly was a trespass, the jury having found that the goods were taken and carried away without the plaintiff's consent, for there was an unlawful invasion by force of his possession of them.

After verdict and before judgment the defendants moved for an order for a return of the goods in mitigation of dam-

ages for their taking to a nominal sum. The court overruled the motion as matter of law, and that was right; for the plaintiff claimed on trial, and his testimony tended to show, that the goods were carelessly and negligently removed by the defendants and thereby greatly damaged, and so, of course, the court could not make the plaintiff take them back with that question undetermined, for that would have deprived him, on the basis of his claim and testimony, of full compensation for the damage caused by the unlawful taking. The case stood in this regard as it would had it appeared that the goods were in fact essentially injured, in which case, no return could have been ordered. *Hart* v. *Skinner,* 16 Vt. 138; *Rutland & Washington R. R. Co.* v. *Bank of Middlebury,* 32 Vt. 639. In *Moon* v. *Raphael, 2* Bing. N. C. 310, TINDALL, C. J., said that had the defendants asked for a stay of proceedings in return of the goods, the plaintiffs would not have been compelled to receive them unless they were in the same plight as when taken and no injury had accrued to the plaintiff.

It is unnecessary to consider whether the taking was so wilful as to disentitle the defendants to an order for a return.

There was no error in the admission nor in the exclusion of evidence. The cost of the goods was some evidence of present value. *Crampton* v. *Valido Marble Co.* 60 Vt. 291, 301, 15 Atl. 153. So in ascertaining the present value of a railroad in order to determine the reasonableness of rates, the original cost of the property is to be considered. *Smyth* v. *Ames,* 169 U. S., pp. 546, 547, L. Ed. p. 849.

Remoteness is suggested, because the goods were bought "years before." But that does not appear. Besides, the question of remoteness will not ordinarily be revised here.

The plaintiff's motive in holding possession being immaterial, it was proper to exclude the cross-question put

to him whether he did not exact a money consideration of the defendants for the privilege of coming in.

Allowing the plaintiff to show the value of his goods sixteen months before the taking, when they were moved into the store, was proper as against the objection now made that they were transitory and had been depleted, for the plaintiff's testimony tended to show that they remained "substantially the same" from that time till the time of the taking. This is like showing the insufficiency of a highway at the time of an accident by showing its insufficiency at a former time, if its condition remained the same. *Cheney* v. *Ryegate,* 55 Vt. 499.

Judgment affirmed, with interest on the damages during stay of execution, and additional costs.

ISAAC S. WILSON *v.* UNION MUTUAL FIRE INS. CO.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed August 26, 1904.

Fire Insurance—Mutual Company—By-Laws—Mode of Proof—Steam Farm Engine—Defined.

In an action on a fire insurance policy, when the defendant, by its charter name, is characterized as a mutual company, and the plaintiff's application shows that a premium note was contemplated, and the policy recites that the assured has become a member by giving a premium note, and on trial plaintiff's counsel said, "There is no question about the proposition that he is a member

of the company," and "they have confessed that they are a mutual company," and urged the court to "remember that this is a mutual company," the plaintiff cannot, in this Court, raise the question of whether there is any evidence tending to show that defendant is a mutual company.

The members of a mutual fire insurance company are presumed to have knowledge of its by-laws, and are bound by them, especially when they are printed on the same sheet with the policy, and the attention of the assured is directed to them by notice in the body of the contract.

When what purport to be extracts from the by-laws of a mutual fire insurance company are printed on the back of its policy, which is issued to and accepted by the assured, and by him held until the loss, in a suit to recover upon the policy they must pass for what they purport to be till some action is taken to impeach them, and those by-laws need not be produced on the trial in any other form.

Though it was said in *Wilson* v. *Ins. Co.*, 75 Vt. 320, that, there being no kind of engine known as a "steam farm engine" the term must be held to cover any engine adapted to farm uses, this did not imply that, if the existence of such an engine were established, the opposite conclusion would necessarily follow.

The mere designation of a particular make of engine as a "steam farm engine" will not entitle it to recognition as such, to the exclusion of other engines of the same style.

When the by-laws of a mutual fire insurance company provided that the use of a "steam farm engine" within a certain distance of the buildings insured shall render the policy void, the use, within the prohibited distance, of a portable engine, adapted to all farm purposes for which an engine can be used, will vitiate the policy, though it appear that a certain other kind of steam engine, which is also adapted to the same uses, and equally likely to communicate fire, and which differs from the engine in question only in particulars relating to its greater mobility, is known as a "steam farm engine."

GENERAL ASSUMPSIT on a fire insurance policy. Plea, the general issue with notice. Trial by jury at the September Term, 1903, Orleans County, *Stafford*, J., presiding. Verdict ordered for the defendant; and judgment thereon. The plaintiff excepted.

This case has been once before in the Supreme Court. See 75 Vt. 320.

J. W. Redmond for the plaintiff.

The plaintiff was entitled to go to the jury upon the question whether there was, at the time the policy was issued, a species of engine known as a "steam farm engine," and if so, whether the engine in question came within that species. *Carrington* v. *Ins. Co.*, 53 Vt. 418; *Mosley* v. *Ins. Co.*, 55 Vt. 143; *Enos* v. *Ins. Co.*, 67 Cal. 621; *Appleby* v. *Ins. Co.*, 45 Barb. 454; *Morton* v. *Fairbanks*, 11 Pick. 367; *Ins. Co.* v. *Favorite*, 46 Ill. 263.

Young & Young for the defendant.

The court correctly ordered a verdict for the defendant. The engine in question is a "steam farm engine" within the meaning of the by-law. The evidence on the second trial has not changed the description of the engine which this Court has once held to be a steam farm engine. 75 Vt. 320.

MUNSON, J. The plaintiff claims there was no evidence tending to show that the defendant is a mutual company. The company is characterized as mutual by its chartered name; the plaintiff's application shows that a premium note was contemplated; the policy recites that the assured has become a member of the company by giving a premium note. In an early discussion plaintiff's counsel said, "There is no question about the proposition that he is a member of the company"; and later in the trial the same counsel said, "They have confessed that they are a mutual company", and urged the court to "remember that this is a mutual company." Having taken this position below, the plaintiff cannot now raise the question of proof.

The defendant being a mutual company, it is not necessary to inquire whether the warning contained in the policy, "Read the by-laws on back of policy", was a sufficient reference to make what is so printed a part of the contract. The members of a mutual company are presumed to have knowledge of its by-laws, and are bound by them. *Frink's Admr.* v. *Brotherhood Accident Co.*, 75 Vt. 249, 54 Atl. 176; *Treadway* v. *Hamilton Mutual Ins.* Co., 29 Conn. 68; *Mitchell* v. *Lycoming Mutual Ins. Co.*, 51 Pa. St. 402; *Donville* v. *Farmers Mutual Fire Ins. Co.*, 113 Mich., 158; *Bourgeois* v. *Mutual Fire Ins. Co.*, 86 Wis. 402; *Pfister* v. *Gerwig*, 122 Ind. 567. Whatever might be urged against this rule if the means of ascertaining the by-laws were not furnished to the insured, it cannot be deemed objectionable when the by-laws accompany the policy upon the same sheet, and the attention of the insured is directed to them by a notice in the body of the contract.

But the plaintiff insists that there is no evidence that the so-called by-laws printed on the back of his policy are the by-laws of the defendant company. The by-laws were not produced on the trial in any other form, and it was not necessary that they should be. These provisions were published as the by-laws of the company upon a policy which the plaintiff accepted and held until the loss, and in a suit to recover upon the policy they must pass for what they purport to be until some action is taken to impeach them.

The by-laws provide that the use of steam farm engines in any building insured, or within one hundred feet of such building, without the consent of the company, shall render the policy void. The plaintiff was using a steam engine, located within the prohibited distance, at the time of the loss. It was held in this case when here upon a former trial as reported in the 75 Vt. 320, 55 Atl. 662, that inasmuch as

it did not appear that there was any class or kind of engine known as a "steam farm engine", the term must be held to cover any engine adapted to farm purposes. Upon this trial the plaintiff undertook to show that there was a species of engine known generally as a "steam farm engine." Upon the objection of defendant's counsel and the suggestion of the court, without exception being taken by the plaintiff, the inquiry was limited to this: "Whether there was a species of engine known to the trade in Vermont by the name of a steam farm engine?" A deposition tending to show that a steam farm engine was manufactured in Ohio and extensively used outside of New England, was received in evidence, but solely for the purpose of supporting other evidence limited as above stated. No exception was taken to the ruling restricting the effect of the deposition. At the close of the plaintiff's evidence the court directed a verdict for the defendant, on the ground that there was no evidence tending to show that at the time and place when and where the contract was entered into the words "steam farm engine" had acquired such a special and restricting meaning that the parties must be taken to have used them in the restricted sense, and not in the general and ordinary sense.

It is clear that there was evidence tending to show that there is a steam engine, known to the trade as a farm engine, and extensively used by farmers in the middle and Western states. This consists of a horizontal boiler with a drop fire-box, and a horizontal engine attached to the top of the boiler, mounted on four wheels for convenience of transportation, and having the smoke-stack hinged so that it can be lowered when the machine is being moved. The machine plaintiff had consisted of an upright boiler with a fire-box at the base and a detachable smoke-stack, and an upright engine attached

to the side of the boiler, which machine was placed on trucks for transportation and stood on the platform of the trucks while in use.

There was but little evidence regarding the use of the first described engine in this section. The deposition before referred to was given by a Western manufacturer of farm machinery, who testified that he knew nothing about the shipments of his firm, but knew that some of these engines had been sent to Vermont from having seen one at South Barton. A member of a firm of machinists in St. Johnsbury testified that previous to May, 1900, there was a species of engine known to the trade in Vermont by the name of a steam farm engine, and described it substantially in the terms first above given. It appeared further that he knew of this only from the catalogues and circulars sent by the manufacturers to the dealers; that he had never bought or sold such an engine, and did not know that one had been used by any farmer in Vermont. This witness identified the picture of a horizontal engine on wheels as a steam farm engine; and another witness, on being shown this picture, said he had seen such engines on farms in Vermont. The witness was not cross-examined on this statement, and nothing further appears as to the extent of his observation. There was also evidence tending to show that there was such an engine on a farm at St. Albans Bay.

The case seems to have been presented upon a mistaken view as to the scope and effect of our former decision. It was said in the opinion that, there being no kind of engine known as a "steam farm engine," the term must be held to cover any engine adapted to farm purposes. This did not imply that if the existence of such an engine were established the opposite conclusion would necessarily follow. When that

fact is shown there come the further inquiries, whether the differences in construction and use between the kind so designated and other portable steam engines are so marked, and whether the application of the name to that particular kind is so general and exclusive, that the parties may reasonably be supposed to have used and understood the term as having reference only to that kind.

It appears that there are many manufacturers making a mounted horizontal engine, and that different names are given to what are substantially the same thing; many of them being called agricultural engines, or portable engines. It appears further that engines of this style, whatever the name given them, are not confined to any particular use. It seems that the engine described in the plaintiff's evidence, and designated by its manufacturer as a farm engine, is also used for hauling on the road, drilling for coal, gas, oil and water, and for grading. It appeared further that the only one of this make which the manufacturer knew of in Vermont was used in a mill for sawing lumber and turning spools and bobbins. It also appeared that the upright engine in controversy, although used by its owner to draw logs from his pond to his mill, had been procured and used by different persons in previous seasons to do the same farm work for which it was being used by the plaintiff.

It is clear that the mere designation of some particular make as a farm engine will not entitle it to recognition as a farm engine to the exclusion of other engines of the same style. If this were so, a mounted machine called a farm engine would be within the prohibition, and a like machine called an agricultural engine, or a portable engine, would not be. It seems equally clear that the mere designation as a farm engine of one of two varieties, both of which are fitted and

used for farm work, will not justify such a distinction. Nor can the better adaptation to farm work of the one so designated be important, unless it appears that this superiority has led to its special recognition or more extensive use us a farm engine.

Our inquiry relates to two steam engines, capable of being used and in fact used for farm purposes, constructed as far as touches the matter of danger from fire in the same way, and both frequently designated as portable engines. The differences pointed out bear only upon the mobility of the machines, and these cannot serve to distinguish them in applying the provision in question. The horizontal position, wagon attachment, and hinged stack, do not touch the essential matter, and cannot be supposed to have been points of distinction that the parties had in mind. We think the evidence fails to present a case upon which the plaintiff can recover under our former decision.

There is nothing in *Frink's Adm.* v. *Brotherhood Accident Co.*, 75 Vt. 249, 54 Atl. 176, that conflicts with this view. The use by an insurer of the term "cattle" as covering all live stock kept for use or profit may well be objected to as likely to mislead the insured. But this probability cannot be urged as a reason for confining the term "steam farm engine" to such of the portable engines as are placed horizontally and upon wheels of their own. The insured could not but have known that the engine he was using for his farm work was the same in every respect that bore upon the purpose of the prohibition as any other variety of steam engine adapted to farm use.

Judgment Affirmed.

MARSHALL FREEHART *v.* SAMUEL STANFORD'S EST.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed August 31, 1904.

Promissory Notes—Items of Book Account—Course of Business—Evidence—Decedent's Books.

In assumpsit against a decedent's estate, whether the books of the decedent, which show promissory notes charged therein by him against the claimant, are admissible in favor of the estate, in respect of those charges, depends upon the character of the page where the items are charged, and the course of business between the parties.

In assumpsit against a decedent's estate, and trial by court, no error appears in the ruling of the court excluding a page of decedent's book, in respect of two items of promissory notes by him charged thereon against the claimant, when there is nothing on the face of the page offered showing that its exclusion was error, and all that the combined exceptions and finding of facts state about the matter is: "There was no evidence tending to show that said two items should be allowed."

In assumpsit against a decedent's estate, it is not error to exclude certain pages of the decedent's book offered by the estate for the purpose of showing that it had been the agreed course of business between the claimant and the decedent for the latter to charge promissory notes on book against the former, the entries which relate to notes being few and remote in date from the items in dispute, and there being no extrinsic evidence in explanation.

APPEAL from the decision of commissioners on the claim presented by Marshall Freehart against the estate of Samuel Stanford, and the claim of D. A. Stanford, the administrator, in offset thereto. Declaration in general assumpsit. Plea, the general issue, and declaration in offset. Trial by Court at the September Term, 1903, Orleans County,

Stafford, J., presiding. Judgment for the claimant. The estate excepted.

On page 180 of decedent's book there are, besides the disputed items, eight charges against the claimant for a cow, hay, goods and labor. The first charge is dated August 1894, and the last, May 1900. The disputed items are charged in this account as follows:

Sept. 19, 1894, note given up.....$ 9.60
Oct. 15, 1895, Watson note..... 68.53

On page 28 of said book is an account headed "Marshall Freehart." The debit side begins with a charge of $30.77, under date of July 8, 1901, "from page 29." Then follow eleven charges for goods, ending with a charge dated July 30, 1893.

The credit side begins, without date "From page 29, $32.00," then follow five items of credit for labor, and the account is balanced with the entry, without date, "By note to balance $10.78." And below is written "Settled this book March 7, '93.

SAMUEL STANFORD,
MARSHALL FREEHART."

On the same page, and immediately below the above, is the following:

"Aug. '93, to leather yoke ....$	1.00	Jan. 6, '94, by balance on Watson note as per agreement ....$	6.48
Jan. 19, '94, to straps..	1.25	Mar. 12, '94, by bill lumber	5.54
Dec. 3, '93, to one whip	.50		
$	2.75		$12.02
To paid on note to balance this book	9.27	Settled Mar. 29, '94."	
	$12.02		
Settled			

On page 29 is an account also headed "Marshall Freehart." It begins with a charge under date of July 8, 1895, then follow twelve charges for goods, and the last charge is,

"April 19, '87, to balance on claims given up .....$23.85."

The credit side has three items, one for a horse, one for interest, and the last is, "Nov. 17, '86, by note of F. G. Clough $100," which balances the account. Below all is written, "Settled April 19, '87.

M. FREEHART,
SAMUEL STANFORD."

Below the above, on the same page, the account continues, with fifteen debit items for goods and cash, the last dated Sept. 13, 1887; and seven credit items, all dated and all for labor or goods, except the item, "By note and claim $28.26," which has no date, and is the second credit item, the first being dated April 28, 1887, the third Sept. 21, 1887, and the last Aug. 13, 1888.

Cook & Williams for the estate.

Pages 28 and 29 of decedent's book should have been admitted as tending to show the course of dealing between the parties. *Scott* v. *Lance,* 21 Vt. 507; *Case* v. *Berry,* 3 Vt. 332; *Hall* v. *Eaton,* 12 Vt. 510; *Gleason* v. *Briggs,* 28 Vt. 136; *Mattocks* v. *Lyman,* 18 Vt. 98.

J. W. Redmond for the claimant.

The items in dispute are not proper matter for charge on book account, except by agreement. *Stevens* v. *Damon,* 29 Vt. 521; *Gleason* v. *Briggs,* 28 Vt. 135; *Hall* v. *Eaton,* 12

Vt. 510; *Fassett* v. *Vincent,* 8 Vt. 73; *Farrand* v. *Gage,* 3 Vt. 326; *Scott* v. *Bailey,* 73 Vt. 49.

HASELTON, J. This was a probate appeal. In county court, Freehart, who was claimant, declared in assumpsit. A plea in offset was filed in behalf of the defendant estate. Trial was had by the court and a finding of facts was filed. The court disallowed two items claimed by the estate. The items were as follows:

"To note given up.....$ 9.60
To Watson note ..... 68.53"

The finding of facts and the statement of exceptions are embraced in one instrument, and all that is said therein about these items is the following: "There was no evidence tending to show that said two items should be allowed. They were charged on the book of the testate, page 180 of exhibit 1, but we hold that they were not properly items of book charge and so exclude the book as to those items to which the estate excepted." The character of the book, page 180 referred to, and the course of business between the parties may, or may not have been such as to make one or both of these items admissible. *Post* v. *Kenerson,* 72 Vt. 341, 47 Atl. 1072, is an instructive case. However, there is nothing in the recitals in the "finding of facts," or on the face of the page itself, warranting the conclusions that would have to be drawn to sustain the exception and put the court in error, and error is not to be presumed.

It is, in substance, stated in the "finding of facts" that the estate offered pages 28 and 29 of the book containing said page 180, for the purpose of showing a course of dealing as to charging and crediting notes on book, and as tending to show that the charges in dispute were made under an implied agreement, and so were properly made. With regard

to these pages it is stated that they were in the handwriting of the decedent. These pages were excluded and to their exclusion the defendant excepted. On these pages there are entries of settlements which purport to be signed by both the decedent and Freehart. The statement that these pages were in the handwriting of the decedent, taken literally, means that the decedent signed Freehart's name. But assuming that the court did not mean this, and that Freehart's name was signed by himself, and that so he had looked over these pages of the decedent's book from time to time, still the entries which relate in some way to notes are so few and so remote in date from the dates of the items in question, and, standing as they do without extrinsic explanation, are so far uncertain in their signification, that we cannot say that these pages 28 and 29 should have been received.

Judgment affirmed.

J. F. COLSTON *v.* W. W. BEAN.

May Term, 1904.

Present: ROWELL, C. J., START, WATSON, and HASELTON, JJ.

Opinion filed August 31, 1904.

Chattel Mortgage—Mortgagee's Verbal Permission to Sell Property—Effect—V. S. 2260, 2262.

Under V. S. 2260, "the person injured" by the sale of personal property covered by a mortgage, without the consent of the mortgagee indorsed on the mortgage and written on the record thereof, may be the mortgagee, or his assigns, or the vendee of the mortgagor.

The unconditioned verbal permission to sell mortgaged personal property, given by the mortgagee to the mortgagor, operates as a release of the mortgage.

To an action for fraud, alleged to have been perpetrated by the defendant upon the plaintiff by selling him mortgaged personal property as free from incumbrance, it is a good defence, notwithstanding the provisions of V. S. 2260, that the mortgagee had given the defendant verbal permission to sell the property.

CASE for fraud. Plea, the general issue. Trial by jury at the June Term, 1903, Windsor County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

J. D. Denison for the defendant.

The court erred in ruling that a verbal license to sell, given by the mortgagee to the mortgagor, would be no defence. After sale and delivery under such license the mortgagee is estopped from foreclosing his mortgage. *Reynolds* v. *Roberts*, 57 Vt. 392.

Joseph C. Enright, and *Edward R. Buck* for the plaintiff.

HASELTON, J. Section 2259 of the Vermont Statutes provides that a mortgagor of personal property shall not sell the same without the written consent of the mortgagee indorsed on the mortgage and on the record thereof. Section 2262, which was amended in 1896, provides for the prosecution and fine of a mortgagor who, without such written consent, sells mortgaged personal property, one-half of the fine to go to the State and one-half to the person injured. Obviously, the person injured may in some circumstances be the mortgagee, or his assignee, and in other circumstances may be a purchaser from the mortgagor. The phrase "person

injured" is used advisedly and wisely and the statutory provisions are of a clear and effective character.

This was an action on the case for fraud alleged to have been perpetrated by the defendant upon the plaintiff, in the sale by the former to the latter of certain wagons and sleighs incumbered by a mortgage. Evidence on the part of the plaintiff tended to show that the defendant represented the property to be free of incumbrance. Evidence on the part of the defendant tended to show that he informed the plaintiff that the property was mortgaged, but told him that he had a right to sell. It appeared that the plaintiff paid the defendant for the property and took possession of a small portion thereof, but that the greater part, being in an unfinished condition, was left with the defendant to finish for the plaintiff, and that subsequently the wagons and sleighs were marked with the name of the plaintiff. The plaintiff's evidence tended to show that after such marking the property was attached as the defendant's, that he then learned of the mortgage, and that the mortgagee threatened him with suit if he took possession of the property. Shortly after the attachment, which the plaintiff's evidence tended to show, the defendant was adjudged a bankrupt, and the loss of the property to the plaintiff ensued.

For the purposes of the trial, the court instructed the jury that, under section 2260 of Vermont Statutes, it was no defence to this action, if the defendant had verbal permission from the mortgagee to sell the property. The question presented to this Court is whether this instruction was correct. This action for fraud is not in any way dependent upon the statute. It is a common law action the right to which was not given by the statute, and was not taken away by the provisions of the statute. In this action it is for the plaintiff

to make out that he was actually defrauded. If the defendant, as his evidence tended to show, gave the plaintiff notice of the incumbrance, then, if the defendant had verbal permission from the mortgagee to sell the property, the plaintiff was not defrauded. Such verbal permission when acted upon operates as a release, or waiver of the mortgage. *Hunt* v. *Allen,* 73 Vt. 322, 50 Atl. 1103. There was evidence tending to show that the plaintiff was not a *bona fide* purchaser, and that there was neither misrepresentation, nor concealment, on the part of the defendant, and that any loss which the plaintiff suffered came upon him because of the course which, with his eyes open, he chose to take with reference to the property after making the purchase and paying over his money.

We hold that the charge to the effect that in no view of the evidence would verbal permission to sell, given to the mortgagor, avail the defendant, was erroneous. This holding in this action on the case for fraud does not in any way touch the question of what constitutes a defence to a proceeding under the statute.

Judgment reversed, and cause remanded.

HELEN J. NELSON *v.* GEORGE F. MARSHALL.

May Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 31, 1904.

New Trial—Grounds—Bills of Exceptions—Failure to Seasonably File—Mistake of Judge—V. S. 1662.

Questions, the decision of which involve a consideration of the evidence, cannot be reviewed by writ of error.

A bill and statement, signed as a bill of exceptions, becomes a mere nullity unless seasonably filed.

When, after trial in county court, the defeated party is precluded from seasonably filing his bill of exceptions solely by reason of accident or mistake on the part of the judge who signed it, he is entitled to a new trial, under V. S. 1662, without regard to the sufficiency of his exceptions.

PETITION for a new trial brought, under V. S. 1662, to the Supreme Court for Windsor County, at its January Term, 1904, and heard at the May Term, 1904, on motion to dismiss the petition.

The petitioner was plaintiff in the suit in county court, which was an action of ejectment tried by jury at the June Term, 1904, of Windsor County. The exceptions taken in that trial by the petitioner were to the admission or exclusion of evidence, and to the court's ordering a verdict against her.

The petition states that within the ten days after the adjournment of said June Term petitioner's bill of exceptions was duly drawn and submitted to the attorney on the other side; that the latter, within fifteen days from the rising of said court, returned said bill with proposals of amendment; that within five days thereafter said bill, with said proposals of

amendment was mailed to the Judge who presided at said trial, for allowance; that said bill was received by the Judge within twenty days from the adjournment of said court; that said bill was duly signed by the Judge and by him mailed to the petitioner's counsel, but the latter did not receive the bill till more than thirty days after the final adjournment of said June Term, and that then he immediately filed it.

J. C. Enright, E. R. Buck, and *Edward H. Deavitt* for the petitioner.

A writ of error will not provide a remedy in this case for the exceptions are not a part of the record. *Small* v. *Haskins,* 30 Vt. 172; *Bank* v. *Colt,* 31 Vt. 415; *Estabrooks* v. *Ins. Co.,* 74 Vt. 202.

The only remedy is by petition under V. S. 1662, and a new trial should be granted. *Sleeper* v. *Croker,* 48 Vt. 9; *Beckwith* v. *Middlesex,* 20 Vt. 593; *Walden* v. *Clark,* 50 Vt. 83; *Bradley Fertilizer Co.* v. *Fuller,* 58 Vt. 315; *Webster* v. *Smith,* 72 Vt. 12.

Gilbert A. Davis for the petitionee.

No laches are imputed to the petitionee or his counsel. The statute is imperative that exceptions shall be filed within thirty days. *State* v. *Wells,* 73 Vt. 265; *Mead* v. *Moretown,* 72 Vt. 323.

Neither a party nor his counsel can waive this provision. *Small* v. *Haskins,* 29 Vt. 187; *Nixon* v. *Phelps,* 29 Vt. 198; *Higbee* v. *Sutton,* 14 Vt. 555; *Shattuck* v. *Oakes,* 14 Vt. 556.

HASELTON, J. This was a petition to this Court, under V. S. 1662, for a new trial of an action tried by jury at the June Term, 1903, of the Windsor County Court. The case

was heard on a motion to dismiss the petition. The petitioner was defeated on trial in the county court, and the petition sets out facts showing that the petitioner took exceptions on trial, that a bill of exceptions was allowed and signed by the presiding Judge, but that without fault on the part of the petitioner, and solely by reason of accident or mistake on the part of the Judge, the bill of exceptions could not be filed until more than thirty days after the final adjournment of the term of court at which the trial was had. In such a state of facts, the right of the petitioner to have the cause passed to this Court, in the usual way on exceptions, was lost. Under our decisions, it is equally clear that a writ of error was not an available remedy, since the exceptions taken involve a consideration of the evidence, which is not a part of the record.

Unless this petition lies, the excepting party is without remedy. V. S. 1662 provides that "the Supreme Court may grant a new trial in a cause determined by such court, or a county court, on petition of either party subsequent to the term of the court at which the original judgment was rendered." Nothing is said in this section with reference to the grounds on which a new trial may be granted; but V. S. 1664, which limits the time for bringing the petition, shows the broad scope of the statute. The reasons assigned may be matter of law; or such reasons may be the discovery of new evidence, or other matter of fact. The phrase "or other matter of fact" appears for the first time in the General Statutes, enacted in 1862, and was obviously intended to make apparent the breadth of scope of the section which is now V. S. 1662. The statute, under which this petition is brought, is remedial and equitable in its nature, is limited by no restrictions of language, and should be liberally construed.

The absolute inability of the Presiding Judge to remedy the mistake makes the case analogous to cases in which a party lost the benefit of exceptions by reason of the death, or illness of the Presiding Judge. Such cases are the following: *State* v. *Weiskittle,* 61 Md. 51; *Crittenden* v. *Schermerhorn,* 35 Mich. 370; *Benett* v. *Steamboat Co.,* 16 C. B., 29; *Taylor* v. *Simmons,* 116 N. C. 70; *Wright* v. *Judge,* 41 Mich. 726.

It is not deemed proper for this Court to hear and determine the questions presented by the bill of exceptions accompanying the petition, and to grant or refuse a new trial according as error is or is not discovered. To pursue such a course, would be to negate the statute and to overrule our decisions with respect to the effect of a failure to have a bill of exceptions signed and filed within the time limited by law. The bill of exceptions not having been seasonably filed, the entry of exceptions must have been struck from the clerk's docket, the clerk could not file, or receive the bill and the statement signed as a bill of exceptions became a nullity, so far as concerned the bringing of the questions therein stated before this Court for determination.

Nor should the principle here apply which requires the petitioner for a new trial in some way to satisfy the Court that the result of a new trial would probably be different from that of the former one. To preserve intact the due administration of the law a broader principle may sometimes be successfully invoked. Such broader principle is recognized in *Walden* v. *Clark,* 50 Vt. 383. In *State* v. *Weiskittle,* above cited, an excepting party had lost the benefit of his exceptions by the death of a Judge. In that case the Maryland Court say: "It is the established practice now, both in England and in this State, that when a party, without laches on his part, loses the benefit of his bill of exceptions by the death or

illness of a Judge, so that he cannot get his exceptions signed and sealed, he will be entitled to a new trial." There being in that State no provision by which the exceptions could be settled by another Judge, the Court did not inquire into the merits of the exceptions taken but said: "The new trial will go as a matter of course."

In *Wright* v. *Judge,* 41 Mich. 726, the trial Judge died without acting upon a bill of exceptions which had been duly submitted to him. The opinion of the Court, in its entirety, is as follows: "Although there was great delay in settling the bill of exceptions, it appears to have been from the inaction of the Judge and not from the fault of the party. The case therefore cannot be distinguished from other cases before decided, where parties have been deprived of their exceptions by circumstances beyond their control. The death of Judge Cochrane without acting upon the exceptions, made a new trial a matter of right."

In another Michigan case, *Crittenden* v. *Schermerhorn,* 35 Mich. 370, the bill of exceptions was settled by the Trial Judge in accordance with a stipulation of counsel after the Judge had retired from office. The Court held that this proceeding was without authority and granted a new trial without any consideration of the merits of the exceptions taken, saying: "Where a party has lost the benefit of his exceptions from causes beyond his control it is proper to give him a new trial." The opinion in this case was delivered by Judge Cooley.

The case of *Taylor* v. *Simmons,* 116 N. C. 70, is fully stated in the following head note: "Where the case and counter case were served in time, appellant immediately applied to the Judge to settle it, and the Trial Judge afterwards died, a new trial will be ordered."

Bennett v. *Steamboat Co.*, 16 C. B. 29, was a case tried before Chief Justice Wilde and a draft of a bill of exceptions was laid before him, but in consequence of his appointment as Lord Chancellor and subsequent illness, all hope of the settlement of the bill of exceptions was abandoned. Thereupon, upon proper application, a new trial was ordered as a matter of course. The report of the case shows the question intended to be raised, but the Court expressed no opinion upon its merits.

The principle which governed the cases above referred to is applicable here. Under the system by which, in this State, justice between parties is administered and upheld, the petitioner had a right to have her exceptions heard in this Court. That right was a substantial one, and it having been lost in the way set out in the petition,

A new trial is granted.

FRANCIS F. HOLT *v.* AUSTIN HOWARD.

January Term, 1903.

Present: TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 31, 1904.

Accounting—Partnership—Assumpsit—Evidence—Statute of Frauds—Waiver—Referee's Report—Exceptions—Questions not Raised at Trial—Interest—Annual Balances—Statute of Limitations.

When, before a settlement between plaintiff and defendant, the plaintiff, who had been in partnership with a third person, became the sole owner of defendant's indebtedness to that firm, and this in-

debtedness was included in said settlement with defendant's knowledge of plaintiff's ownership thereof, plaintiff may recover, in an action of assumpsit in his own name, the balance found due on this settlement, including that partnership debt.

When it appears that plaintiff and defendant intended that all their business deal, except notes, should be a mutual and open account, and that the charges of each should apply in payment of the charges of the other, all such business deal, except notes, should, in respect of the Statute of Limitations, be reciprocally applied as proper matter of an open and current book account.

There is no difference between the actions of assumpsit and book account, in respect of what items are barred by the Statute of Limitations.

If, in the exceptions to the report of a referee, it is claimed that he allowed various items and classes of items without evidence, the Court will not consider that question, unless it appears that the entire evidence is before it, although all the exhibits, and the referee's "minutes" of the evidence, are sent up.

When, at the hearing before the referee, no evidence was received against defendant's objection, except evidence relating to one item, he cannot, by exceptions to the report, raise general objections as to the admissibility of evidence.

When, in a trial before a referee, a witness is permitted to refer to his books to refresh his recollection, it is proper to allow him to designate to the referee the matter that he claims aids his memory.

When evidence obnoxious to the Statute of Frauds is received without objection, the statute is waived.

On an accounting, the referee properly disallowed items in defendant's specification which he found to be payments for things not charged in plaintiff's specifications.

In assumpsit on an open and current book account, interest should be allowed on annual balances.

GENERAL ASSUMPSIT. All necessary pleas treated as filed. Heard on report of a referee and exceptions thereto at the May Term, 1902, Windsor County, *Haselton*, J., presiding. Judgment *pro forma,* for the plaintiff. The defendant excepted. This was an accounting involving a business deal of thirty-two years. The plaintiff's specifications consist of 4,140 items, the defendant's of 535 items.

T. F. Strange, and *J. D. Denison* for the defendant.

The so-called "settlement" of December 1, 1887, was not a settlement, because it is found there were a number of items that were not then adjusted, but were left for further investigation. *Lockwood* v. *Thorne,* 18 N. Y. 286, 288; *Carpenter* v. *Nickerson,* 7 Daly 424; *Rahill* v. *McTague,* 114 Pa. St. 82; *Harvey* v. *R. Co.,* 13 Hun. 392; *Stenton* v. *Jerome,* 54 N. Y. 484.

If a settlement was made December 1, 1887, the balance then found due is barred by the Statute of Limitations. *Belchertown* v. *Bridgman,* 118 Mass. 486; *Bass* v. *Bass,* 8 Pick. 187; *Chace* v. *Trafford,* 116 Mass. 529; *Doland* v. *Sprague,* 12 Pet. 300; *Spring* v. *Ex. of Gray,* 6 Pet. 156; *Union Bank* v. *Knapp,* 3 Pick. 96; Angel Limitations, 150, 151, 160; 2 Green, Ev. § 447.

The items that were left unadjusted at that settlement are also barred by the Statute of Limitations. *Belchertown* v. *Bridgeman,* 118 Mass. 486; *Union Bank* v. *Knapp,* 3 Pick. 96; *Bass* v. *Bass,* 8 Pick. 187; *Chace* v. *Trafford,* 116 Mass. 529; *Donald* v. *Sprague,* 12 Pet. 300; Angel Limitations §§ 150-151-160; 2 Greenl. Ev. § 445.

Pingree & Pingree for the plaintiff.

It must be affirmatively shown that the referee considered improper evidence. *Martin* v. *Wells,* 43 Vt. 433.

The findings of the referee are conclusive, if there was any evidence tending to establish them. *Harris* v. *Howard,* 56 Vt. 695.

HASELTON, J. This was an action of general assumpsit. The case was referred and was heard by the referee under an agreement to the effect that any and all pleadings which either

party might desire to have treated as filed should be so treated.

The plaintiff was for a great many years a country merchant. For some years prior to 1887 he had a partner in the mercantile business, but after that date he carried on such business alone. Aside from his mercantile business, the plaintiff had engaged in the lumber business, a business in which the defendant was for a long time engaged. The plaintiff and the defendant dealt extensively with each other, and at times were jointly interested in lumber transactions. The plaintiff kept books covering a part of his business with the defendant for the whole time of its continuance, and the defendant kept books covering a part of such time. Both parties testified, and used, as well they might, books, diaries, scraps of paper, checks, check stubs and various memoranda to refresh their recollection. It appeared that many of their dealings were adjusted at, or about, the time of the dealings themselves, and that so no entry of them was made on any book of account.

The referee found and the parties conceded that in consequence of the way in which their accounts had been kept, the extent of their dealings, the time covered thereby, and the indistinct recollection of the parties, a condition of uncertainty existed.

Prior to December 1, 1887, and after the dissolution of the partnership referred to, the parties to this suit spent several days in looking over their dealings with a view to a settlement; and on said December 1, they agreed that, leaving certain items for future investigation and adjustment, there was then due the plaintiff the sum of $2,158.32. The defendant discusses this adjustment and its effect at considerable length, but we think there can be no question that, in

the agreed state of the evidence, the referee was warranted in taking, as he did, what the parties had settled upon, so far as their adjustment went, as a basis from which to work. It is true that the dealings of the former partnership with the defendant entered into the partial settlement of December 1, 1887; but that fact presents no difficulty, as it is found that at that time Holt, having previously bought out his former partner, was the sole owner of the partnership account against the defendant, and that the adjustment was had with knowledge of such ownership on the part of the defendant, and that the partnership account was always treated by both the plaintiff and the defendant as a matter of deal solely between them. In these circumstances there was no obstacle to the adjustment of the partnership account between the plaintiff and the defendant. The principle that, if suit is brought on an assigned claim, not a negotiable instrument, the suit must be in the name of the assignor, has no application here.

One of the important findings of the referee is thus stated: "I find that each of the parties intended their dealings, aside from notes, should be a mutual open account, and the payments and charges of each should apply on the payments and charges of the other." The defendant excepted to the report on the ground that he did not get the benefit of the Statute of Limitations with respect to various items which are of such a character that without this finding each would stand by itself in relation to that statute. But this finding shows that, by a common understanding, the parties brought all of their dealings not represented by notes into a mutual account; and throughout this long-continued mutual account items of debit and credit are so far contemporaneous that notes alone could be barred by the Statute of Limitations. An examination of the report shows the disallowance of notes

on which the statute had run, and shows no error in determining what did, and what did not, belong in the mutual account which the referee was required to pass in review. The defendant claims that, as the action is assumpsit, the Statute of Limitations bars items that would not be barred, if the action were book account. This claim is, however, a mistaken one.

The defendant, in his exceptions to the report, and in argument, claims that various items and classes of items were allowed without evidence. Now, the case has once been remanded, on application of the defendant, to enable him to avail himself of his claim in this regard and of other claims made by him, but as the case finally comes up this claim as to lack of evidence stands upon assertion merely. All the exhibits have, indeed, been sent up or have been referred to generally, and such long hand minutes as the referee took of the testimony are also before us. But it cannot be assumed that the referee wrote out the oral evidence in its entirety. If any assumption were to be made, it would naturally be that the referee's "minutes" were such as he deemed necessary to enable him to refresh his recollection and recall the testimony in full when he came to determine his findings and make up his report. There being no showing that the entire evidence is before the court, we have declined to examine the mass of exhibits or to study such minutes of testimony as the referee took, not because the task of doing so would be arduous, but because for the reasons stated it would necessarily be futile.

The defendant seeks to avail himself of the claim that inadmissible evidence of various kinds was received. But it appears that no evidence was received against the objection of the defendant except evidence relating to one item. This

being so, the defendant cannot by exceptions to the report raise general questions as to the admissibility of evidence. In testifying as to the item referred to, the plaintiff, under objection and exception, was allowed to refer to his books to refresh his recollection, and in connection with such testimony to designate what appeared upon his books in relation to the matter. Surely, it was proper for the referee to have stated, and shown to him, whatever the witness used under the claim that it aided his recollection.

One of the defendant's claims is that certain items were, under the Statute of Frauds, not provable by oral testimony. But the Statute of Frauds is, so far as concerns means of proof, a rule of evidence which may be waived, and which is waived unless objection is made to the proof offered. In the hearing before the referee any evidence which may have been obnoxious to the Statute of Frauds was received without objection and so the statute was waived. Clearly, the parties were actuated by a common desire that the referee should receive and consider whatever might logically aid him in arriving as nearly as might be at an accurate result.

What may be called the defendant's general exceptions to the findings and report of the referee are grouped under numerous headings. However, all the points made under these headings have, it is believed, been reviewed in what has thus far been said. At any rate, all the defendant's claims under these numerous headings have been examined and considered, and all are held to be untenable.

The defendant claims that the report itself shows specifically that certain designated items of his account were improperly disallowed. The referee disallowed these items because he found that they were payments for things not charged in the plaintiff's specification. In connection with the finding

of the referee that the parties had many dealings that were settled and adjusted about the time of the transactions themselves, the disallowance of these items was proper. The defendant was entitled to have these payments applied but once, and the referee found, in effect, that they had been once applied in dealings not brought before him in the accounting.

The defendant, too, calls attention specifically to a list of items allowed the plaintiff and claims that each of these items was improperly allowed; but the claim in the case of each item so pointed out is some one of the ill-grounded claims already considered.

In arriving at an ultimate result, the referee computed simple interest on annual balances, and the defendant claims that such computation was improper and illegal. But the rule followed in the matter of interest was that which the well settled law of Vermont made applicable in the situation and circumstances disclosed by the report.

The county court rendered judgment on the report for the plaintiff and that

Judgment is affirmed.

STATE *v.* MITCHELL BLAY.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

Opinion filed August 31, 1904.

Criminal Law—Evidence—Confession—Intent—Question for Jury—Reasonable Doubt—Need not Define.

In a prosecution for horse stealing, when the respondent, after the larceny in question, and before his arrest therefor, and while

under arrest for stealing another horse, voluntarily replied to the officer then in charge of him, in answer to the question why he stole "those horses," that he supposed it was "habit," this statement was admissible, and its effect was properly left to the jury.

In a prosecution for stealing a horse, it is proper to allow the State to show that, at the preliminary hearing before a justice of the peace, where respondent had no counsel, when a complaint for the larceny in question was read to him, he said, "I am guilty of that, sir," it not appearing that he made this statement by way of waiving an examination.

In a prosecution for larceny, extrajudicial confessions, alone and uncorroborated, are insufficient to establish the *corpus delicti*, but slight corroboration may be sufficient to establish it.

When, in a prosecution for stealing a horse, the evidence tends to show that the respondent hired a horse to drive to a particular place, promising to return the same day, that after driving to such place he disposed of the horse, which was never returned, and then left the place by rail; that later he admitted he stole the horse; the question of his felonious intent is for the jury.

In charging a jury in a criminal case, it is not error for the court to omit to define the term "reasonable doubt."

INFORMATION for grand larceny. Plea, not guilty. Trial by jury at the March Term, 1904, Orleans County, *Haselton*, J., presiding. Verdict guilty; judgment and sentence. The respondent excepted.

The exceptions state that in February 1904, when respondent had the talk with the officer which is referred to in the opinion, no complaint or warrant had been issued for the larceny here in question.

F. E. Miles and *H. F. Graham* for the respondent.

It was error not to direct a verdict for respondent. No felonious intent was shown to exist at the time of the taking. This is necessary. 1 Bish. Crim. Law, § 207; *State* v. *Smith*, 2 Tyler 272; *People* v. *Call*, 43 Am. Dec. 655; Repalja Larceny, §§ 18-23.

The omission of the court to define reasonable doubt was error. *State* v. *Hopkins,* 56 Vt. 251; *Vaughan* v. *Porter,* 16 Vt. 266.

A. W. Farman, State's Attorney, for the State.

The fact that the confession was made to an officer while respondent was in his custody, does not render it involuntary. McKelvey Ev., 117.

The rule is that the *corpus delicti* cannot be shown by confessions alone, but these should be considered with other evidence. Bish. Crim. Proc. Vol. I, § 1058; *Winslow* v. *State,* 70 Ala. 42; *Smith* v. *State,* 17 Neb. 358.

TYLER, J. Information for larceny, trial, conviction and sentence.

It appeared that on October 29, 1900, the respondent hired a horse and wagon at a livery stable in Derby for the professed purpose of driving to the village of Newport, and promised to return the same day; that he drove to Newport, hitched and left the horse there and went by train to St. Johnsbury; that search was made for the property, but it was not recovered, and has never since been seen by the owner.

1. It also appeared that in February, 1904, an officer arrested the respondent upon a warrant for stealing another horse, and the State was permitted to prove under exception, that while he was in custody the officer asked him why he stole these horses, and that he replied that he supposed it was "habit." As the answer was not induced by threats or promises, but was voluntary, it was admissible. *State* v. *Carr and Loomis,* 37 Vt. 191; *State* v. *Gorham,* 67 Vt. 365, 31 Atl. 845. The respondent contends that there was no evidence tending to show what horses were referred to by the officer, but we think it was competent for the jury to decide whether or not,

in the circumstances, the respondent understood that the question included the Derby horse.

2. It appeared that the respondent, soon after his arrest, was taken before a justice of the peace; that he had no counsel and was not advised as to his rights. The State offered and was allowed to prove, subject to exception, that a complaint for this larceny was then read to him, whereupon he said, "I am guilty of that, sir." It does not appear by the exceptions nor by the record that the respondent made this statement by way of waiving an examination, but voluntarily, upon being informed of the charge, therefore it was properly admitted. See *Parker* v. *Couture,* 63 Vt. 449, 21 Atl. 494.

3. The respondent moved for a verdict upon the ground that there was no evidence of a criminal intent. The respondent pretended to hire the horse and wagon to drive to a specified place, yet if he obtained possession thereof under a false pretence of hiring, but with the felonious intention of converting the property to his own use and thereby of permanently depriving the owner of it, the taking was criminal. What his intent was at the time of the taking could be learned only from the fact that the property was never returned, and from his statements made after his arrest, if the jury found that the statements were made. It is the general rule that extra-judicial confessions, alone and uncorroborated, are insufficient to establish the *corpus delicti,* but slight corroboration may be sufficient to establish it. I Bish. Crim. Pro. § 1058; 5 Am. Crim. Law R. 43, 363. In consideration of the fact that the respondent did not return the property and of his alleged admissions, the court properly denied the motion for a verdict.

4. The respondent excepted to the omission of the court to explain to the jury the meaning of the term "reasonable doubt."

In Bish. Crim. Pro. § 1194, it is said, "There are no words plainer than reasonable doubt and none so exact to the idea meant." In the same section the writer says in respect to definitions: "We have not seen one which can safely be pronounced both helpful and accurate." In 23 Am. & Eng. Ency. 955, it is said that attempts to define the term are futile; "that the words are of plain and unmistakable meaning, and that any definition on the part of the court tends only to confuse the jury and to render uncertain an expression which, standing alone, is certain and intelligible." This view is sustained in *Miles* v. *U. S.*, 103 U. S. 312; *Dunbar* v. *U. S.*, 156 U. S. 199. In the former case Mr. Justice Woods remarked that "attempts to explain the term, ... , do not usually result in making it any clearer to the minds of the jury." Mr. Freeman, in his notes to *Burt* v. *State,* 48 Am. St. R. 563, remarks that nearly every attempt to explain the words renders an explanation of the explanation necessary.

Some courts have held that the term should be defined. Numerous cases might be cited where definitions have been considered and approved or held erroneous, but the great weight of authority is that no definition of the term need be given.

Judgment that there was no error.

HORATIO N. GOODELL *v.* WILLIAM W. TOWER, NEWMAN WEEKS and FRANK S. HASTINGS.

May Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed August 31, 1904.

False Imprisonment—Justice of the Peace—Personal Liability — Jurisdiction—Void Complaint—Warrant—Officers—Justification—Void Precept—Pleading—Damages.

When the warrant, under which the plaintiff was arrested, was issued by a justice of the peace on the complaint of one who had no legal authority to make such complaint, the justice had no jurisdiction of the subject matter, no authority to issue the warrant, and is, therefore, personally liable for false imprisonment.

Every restraint upon a man's liberty is, in the eye of the law, an imprisonment.

When an officer, having in his possession a void complaint and warrant for plaintiff's arrest, met plaintiff, stopped him by speaking to him, read the paper to him, told him he would have to go with the officer, and followed him to the village, and went with him to the place of trial, and when there informed the justice that plaintiff was present, and made his return on the warrant, and the plaintiff understood he was in the officer's custody, these facts show a false imprisonment of the plaintiff.

In criminal proceedings, the complaint and warrant constitute the precept, and when the complaint showed on its face, that the justice of the peace, who signed the warrant, had no authority to issue it, the officer who served such precept cannot justify thereunder.

When the person who signed the complaint on which a criminal prosecution before a justice of the peace is based had no authority to do so, such person, together with the justice who issued the warrant and the officer who served it, are jointly liable for false imprisonment.

In an action for false imprisonment, wherein it is found that plaintiff was arrested upon a void criminal process returnable before a justice of the peace; that the case was appealed to county court,

and there dismissed; the plaintiff may recover all his damages arising from the prosecution after his first appearance before the justice till said dismissal, as against the person who signed the complaint without authority, the justice who issued the warrant, and the officer who served it.

In an action for false imprisonment the plaintiff may recover for loss of time and for mental suffering, though same be not specially alleged.

TRESPASS for false imprisonment. Plea, the general issue. Trial by court at the September Term, 1903, Rutland County, *Munson,* J., presiding. Judgment for the plaintiff. The defendant excepted.

The return upon the warrant was signed by defendant Hastings, as constable, and stated that he "arrested the body of" the plaintiff. The finding of facts stated that the criminal case against the plaintiff was dismissed by the county court; that plaintiff did not understand that the case stood on motion to dismiss, and was in attendance with his witnesses; that "we assess the damages at $291.10, which includes all damages arising from the prosecution of the complaint subsequent to the first appearance of the plaintiff before the justice, those being the larger part of the sum allowed." The above is all that is said on the subject of damages. The opinion states the other facts.

Butler & Moloney for the defendants.

The facts found show no trespass. No force was used. The injury shown was not the direct result of force. The action should have been case. *Phelps* v. *Goddard,* 1 Tyler 60; *Bannister* v. *Wakeman,* 64 Vt. 203; 26 A. & E. Enc. of Law 573.

The officer can justify under the warrant. This was regular in every particular. *Bugbee* v. *Boyce,* 68 Vt. 311;

Gage v. *Barnes,* 11 Vt. 195; *Churchill* v. *Churchill,* 12 Vt. 661; *Carlton* v. *Taylor,* 50 Vt. 220; *McMahon* v. *Green,* 34 Vt. 70; *Hooker* v. *Smith,* 19 Vt. 151; *Bannister* v. *Wakeman,* 64 Vt. 203; *Rudd* v. *Darling,* 64 Vt. 456.

The plaintiff put this warrant into the case, hence the officer may avail himself of it in justification, under the general issue. *Allen* v. *Parkhurst,* 10 Vt. 557; *Walker* v. *Hitchcock,* 19 Vt. 634; *Briggs* v. *Mason,* 31 Vt. 433; *Richardson* v. *Stockwell,* 31 Vt. 439.

The officer cannot be held for what happened after he delivered plaintiff into the justice court and returned the warrant. His connection with the matter ended there. *Valparaiso* v. *Moffatt,* 54 Am. St. 522; *Kirkwood* v. *Miller,* 73 Am. Dec. 135; *Leach* v. *Travers,* 41 Vt. 670; *State* v. *Weed,* 21 N. H. 262.

William W. Stickney, John G. Sargent and *Homer L. Skeels* for the plaintiff.

Where the magistrate has no jurisdiction, all who act with him or execute his process, are trespassers. *Von Ketler* v. *Johnson,* 57 Ill. 109.

Any restraint of another's liberty is an imprisonment. *Moury* v. *Chase,* 100 Mass. 79; *Bissell* v. *Gould,* 19 Am. Dec. 480; *Comer* v. *Knowles,* 17 Kan. 441.

TYLER, J. This action is trespass for false imprisonment. The question arises upon the complaint upon which the warrant was issued.

V. S. 5001 reads: "Sheriffs, deputy sheriffs, constables, police officers, other prosecuting officers and all officers of societies for the prevention of cruelty to animals shall prosecute violations of the preceding sections of this chapter which come to their notice or knowledge."

The complaint was made by William W. Tower, who described himself therein as "officer or agent of the Society for the Prevention of Cruelty to Animals within and for the County of Rutland," and signed it, "William W. Tower, agent," and thereupon the justice issued the warrant. It could not be maintained, and it is not insisted that Tower had authority under the statute to make the complaint as agent, therefore we are not called upon to decide whether a legally organized society of this kind might confer authority upon a certain officer to make complaint for a violation of this statute. That question does not arise.

1. As Tower had no legal authority to make the complaint, it follows that the justice had no jurisdiction of the subject matter and no authority to issue the warrant. And it is the law in England and in this country that where a justice of the peace or other inferior magistrate acts without his jurisdiction in issuing a warrant, to the injury of another person, the magistrate is personally liable. 2 Am. & Eng. Ency. 897, and cases cited. *Morrill* v. *Thurston,* 46 Vt. 732; *Carlton* v. *Taylor,* 50 Vt. at page 227; *Vaughn* v. *Taylor,* 56 Vt. 111. The rule is again recognized in *Banister* v. *Wakeman,* 64 Vt. 203, 23 Atl. 585.

2. It is contended in defendant Hastings' behalf that he did not restrain the plaintiff of his liberty. The trial court found that, having the complaint and warrant signed respectively by the other two defendants, he met the plaintiff and stopped him by speaking to him as he was driving along on a business errand, read the paper to him and told him he would have to go with him, Hastings; that the plaintiff told the officer that he would have to get some one to take his team; that the officer permitted him to do his errand, but directed him to return as soon as he could; that the plaintiff then drove

along; that Hastings became impatient, and went to meet him, turned in behind the plaintiff's team and followed him to the village; that he went to the place of trial with the plaintiff, delivered the paper to the justice and informed him that the plaintiff was present; that this was all that Hastings did besides making his return upon the warrant; that he understood that the plaintiff was in his custody.

The action of the officer constituted a false imprisonment of the plaintiff. It was not necessary that he should lay his hands upon him. It was sufficient that the plaintiff was within his power and submitted to the arrest. *Mowry et al.* v. *Chase,* 100 Mass. 79. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effected. 2 Kent's Com. 26. And see *Pike* v. *Hanson,* 9 N. H. 491, cited in the notes, where it was held that words may constitute an imprisonment, if they impose a restraint upon the person, and he is accordingly restrained and submits. The law is so well settled upon this subject that it is hardly necessary to cite authorities, but the notes in *Bissell* v. *Gould,* 19 Am. Dec. 480, 1 Wend. 210, are interesting and clearly elucidate the rule that to constitute an arrest there must be some real or pretended legal authority for taking the party into custody; that he must be restrained of his liberty; that if he submits and is within the power of the officer it is sufficient without an actual touching of his person. This is the rule laid down by SAVAGE, C. J., in the main case, and it has not been departed from in recent authorities.

3. Defendant Hastings contends that it was within the jurisdiction of the justice to issue such a warrant, that the justice instructed him to serve it, and as it appeared to be in proper form, he was justified in making the arrest. But the

complaint and warrant constituted the precept, and the complaint being signed by Tower as agent, it was apparent upon its face that the justice had no authority to issue the warrant. *Sartwell* v. *Sowles & Ladd,* 72 Vt. 270. The case does not fall within the rule that an officer is justified for his actions within the scope of the command of a process appearing on its face to have been regularly issued, as was held in *Pierson* v. *Gale, et al.* 8 Vt. 509; 30 Am. Dec. 487. The justice had no more authority to issue a warrant upon this complaint than he would have had if the complaint had not been signed at all, and it is well settled that while an officer may justify an arrest upon a process that is voidable only, he is liable for false imprisonment when the process is absolutely void for want of jurisdiction in the justice or for other cause. *Boeger* v. *Langenberg,* 10 Am. St. R. 322 and notes; *Mitchell* v. *State,* 54 Am. Dec. 253 and notes. There is also a full discussion of this subject in the opinion and notes in *Savacool* v. *Boughton,* 21 Am. Dec. 181 and in 12 Am. and Eng. Ency. 744. This rule was recognized by this court in *Churchill* v. *Churchill,* 12 Vt. 661, and in *Tenney* v. *Harvey & Smith,* 63 Vt. 520, 22 Atl. 659.

4. Upon the authorities all the defendants are liable. It is laid down in 2 Add. on Torts, 41, that: "All persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it." In the notes this author says that a person who aids or abets an unlawful arrest is liable for false imprisonment. It was held in *Bissell* v. *Gould, supra,* that all persons who are concerned in an illegal arrest are trespassers. In 12 Am. & Eng. Ency. 751, the rule is stated and supported

by many authorities cited in the notes that: "A person who causes, instigates and procures an unlawful imprisonment is liable in damages therefor. Although, it has been held, the defendant himself did not in person impose the restraint upon the plaintiff, if he is the moving cause of the imprisonment he will be held responsible for it." *Von Ketler* v. *Johnson,* 57 Ill. 109, cited by plaintiff is an authority upon this point.

The case shows that the plaintiff was tried by a jury in the justice's court, convicted and fined, and that he appealed the case to the county court, where it was finally dismissed.

5. We are unable to find from the record that all the damages found for the plaintiff in the trial court were not the natural and proximate result of the defendants' wrongful acts. The plaintiff was entitled to compensation for loss of time, and for mental suffering without a special allegation.

Judgment affirmed.

STATE *v.* HARRY W. DARLING.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

Opinion filed September 15, 1904.

Criminal Law—Intoxicating Liquor—Sale Without License—Information—Joinder of Separate Offences—Election—Discretion of Court—Evidence—No. 90, Acts 1902—Fine.

In a prosecution, under an information consisting of two counts charging two separate offences of the same kind and subject to the

same punishment, whether the State shall be required to elect on which count it will stand, and, if so, at what stage of the trial, is discretionary with the county court.

In a prosecution, under an information consisting of two counts charging two crimes of the same nature, the refusal to require the State to elect on which count it will stand is not an improper exercise of discretion, when it does not appear that there is anything to embarrass the respondent in defending against both charges before the same jury.

The authority given the court by section 68, No. 90, Acts 1902, to impose a fine of "not less than $300," with no limit upwards, is unlimited as to the amount of the fine, except for the minimum requirement.

When, in a prosecution under No. 90, Acts 1902, the information consisting of two counts charging two separate offences of selling intoxicating liquor without a license, the verdict is "guilty on both counts," the respondent is properly fined $600.

Such a record discloses merely the familiar case of conviction of several offences of the same grade, punishable alike, and of the imposition of a sentence within the authority of the court to impose for one of those offences, and does not raise the question of whether cumulative sentence might have been imposed.

When, in a prosecution under No. 90, Acts 1902, the information consists of two counts charging two separate offences of selling intoxicating liquor without a license, the jury are properly instructed to treat each count as a separate accusation, and it is not error to omit to charge that all the evidence in the case should be considered under each count.

Evidence tending to show that two persons went to respondent's place of business for the purpose of buying of him a bottle of whiskey, that when both were there, they asked respondent for a bottle of whiskey, which he procured and handed to one of them who took it and paid for it, tends to show a joint sale.

Under section 68, Acts 1902, each unlawful sale, constitutes an offence and incurs a distinct penalty.

Any person selling liquor without a license is liable to punishment under section 68, Acts 1902, whether the sale is in a town which has voted "License," or in one which has not.

INFORMATION in two counts, under No. 90, Acts 1902, for selling intoxicating liquor without a license. Plea, not

guilty. Trial by jury at the March Term, 1904, Orleans County, *Haselton,* J., presiding. Verdict, "guilty on both counts." Judgment; and sentence that respondent pay a fine of $600 and costs. The respondent excepted.

Each count charged a separate and distinct offence, and each charged a joint sale to T. G. Kaulbeck and W. F. Tasker.

The evidence of the State tended to show that Kaulbeck and Tasker were detectives employed by the State to procure evidence against persons who were unlawfully selling intoxicating liquor; that on each occasion named in the information they went to respondent's place of business, asked him to sell them a bottle of whiskey, which the respondent thereupon procured and handed to one of them who took it and paid for it. The opinion states the case.

J. W. Redmond and *Frank E. Miles* for the respondent.

The State should have been required to elect on which count it would stand. It was error to try the respondent for two separate offences in the same proceeding and before the same jury. *State* v. *Smalley,* 50 Vt. 736; *People ex rel Tweed* v. *Liscomb,* 19 Am. Rep. 207; *Gilbert* v. *State,* 65 Ga. 449; *West* v. *People,* 137 Ill. 189; *People* v. *Keefer,* 97 Mich. 15; *People* v. *Rohrer,* 100 Mich. 126; *Bass* v. *State,* 63 Ala. 108; *State* v. *Reel,* 80 N. C. 442; *State* v. *Scott,* 15 S. C. 434; *State* v. *Woodard,* 38 S. C. 353; *Ball* v. *State,* 48 Ark. 94; *State* v. *Skinner,* 8 Pac. Rep. 420; *State* v. *Crimmins,* 2 Pac. Rep. 574; Bish. Crim. Proc. Vol. 1, § 452.

A. W. Farman, State's Attorney, for the State.

It was not error to refuse to compel the State to elect on which count it would stand. Clark's Crim. Proc. 293; *Carleton* v. *Com.* 5 Met. 532; *Josslyn* v. *Com.* 6 Met. 236;

Com. v. *Castello,* 120 Mass. 358; *Com.* v. *Leach,* 156 Mass. 99.

STAFFORD, J. The respondent was informed against for selling intoxicating liquor without a license. There were two counts, relating to different occasions, and there was evidence in support of each count. When the evidence was all in the respondent moved that the State be required to elect which of the counts it would stand upon and to enter a *nol. pros.* as to the other. The motion was overruled and an exception was taken. The Court submitted to the jury whether the respondent was guilty on either or both of the counts; to which the respondent excepted. The jury having returned a verdict of "guilty on both counts," judgment was entered thereon and sentence imposed that the respondent pay a fine of $600 and costs. "To entering said judgment and imposing said fine" the respondent excepted.

Under these three exceptions the question is now presented, whether the respondent could be legally tried, convicted and sentenced upon the two counts, charging two separate and distinct offences of the same kind and subject to the same punishment. It is admitted that such counts may properly be joined and that no advantage can be taken thereof by demurrer or motion to quash. *State* v. *Smalley,* 50 Vt. 736; *State* v. *Lockwood,* 58 Vt. 378, 3 Atl. 539. Whether the State should be put to its election, and if so at what stage of the trial, are matters for the discretion of the trial court. If the accused will be confounded in his defence or deprived of the protection of legal rules by requiring him to answer both charges before the same jury, the court will not compel it. But the offences may be so related to each other that justice will seem to demand a joint trial, as in *Pointer* v. *U. S.,* 151 U. S. 396, 38 L. Ed. 208, where two

murders were committed by the respondent at the same place, with the same instrument at almost the same time, and in substantially the same circumstances. In that case a verdict of guilty was returned under two counts alleging the different murders, and a death sentence sustained. Although the Act of Congress—R. S. 1024—expressly permitted the joinder of certain offences, the Court said that the statute did not solve the question but left the Court to determine whether in a given case the joinder was consistent with the settled principles of criminal law, and held that in the case before it the joinder was proper. The case is full authority upon the discretion of the trial court as to whether and when the prosecution should be required to elect. Although it does not appear in the present case that the offences were so related as to throw light upon each other, neither does it appear that there was anything to embarrass the respondent in defending against both before the same jury, and there is no reason to question the soundness of the exercise of discretion. There was clearly no error in refusing to require the State to elect, nor in submitting the question of guilt under both counts, nor in rendering judgment and imposing sentence upon the verdict provided the sentence itself was legal. The principal question touching the validity of the sentence is based upon the theory that the fine exceeded the maximum which might be imposed for a single offence, so that there were really cumulative sentences. This assumption is unsupported by the record. Only one judgment and only one sentence was rendered or imposed and the amount of the fine was not greater than might be imposed for one offence. The authority of the court being to impose a fine of not less than three hundred dollars, with no limit upwards, is like the common law authority of the English courts in misdemeanors, unlimited as

to the amount of the fine, except for the minimum requirement. The case, then, is the familiar one of a conviction of several offences of the same grade, punishable alike, and of the imposition of a sentence within the authority of the court to impose for a single one of those offences. Even the authorities cited by the respondent recognize the perfect regularity of such a course. *Tweed's case* itself, *People* v. *Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, discredited though it is by courts and text writers, furnishes in its long review of authorities abundant proof of the soundness of this statement, and no support for the contention of the respondent. We are not to be understood as deciding that cumulative sentences may not be imposed in a case like this but only as pointing out that the question is not presented by the record.

The jury was properly instructed to treat each count as a separate accusation.

There was no error in omitting to charge that all the evidence in the case should be considered under each count. It was only the evidence applicable to the count, that was to be considered in determining the respondent's guilt thereunder. If there was evidence applicable to both counts it was to be considered under each. Such was the substance of the charge as we read and understand it, although respondent's counsel seems to regard it otherwise.

There was evidence tending to show a joint sale to the parties named in the information. The motion to set aside the verdict was, therefore, properly denied.

The penalty prescribed in Acts of 1902, No. 90, Sec. 68, relates to all who sell, etc., without a license, whether in license towns or elsewhere. The argument that it relates only to violations of the act in towns that have voted license, and that violations of the act in other towns are punishable only under Sec. 81, is colorable but not convincing.

We think also that each separate sale or furnishing constitutes an offence and incurs the penalty. But as we have already remarked the fine imposed was not greater than might have been imposed for one offence, and there was but one judgment and one sentence.

Judgment that there is no error in the proceedings of the County Court, and that the respondent take nothing by his exceptions. Let a mittimus issue and execution be done.

SUSAN W. HUBBARD *v.* ASAHEL H. HUBBARD.

May Term, 1904.

Present: MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed September 5, 1904.

Wife's Real Property—Husband's Estate—Conveyance by Wife—Due Process of Law—Judicial Discretion—No. 49, Acts 1896—Unconstitutional.

No. 49, Acts 1896, which authorizes the Court of Chancery, "in its discretion," on a wife's petition, to empower her to convey real estate by her separate deed, is unconstitutional in that it undertakes to clothe a court with power to deprive a husband of his property without due process of law.

APPEAL IN CHANCERY. Heard on petition, answer, master's report and exceptions thereto, at the December Term, 1903, Addison County, *Tyler*, Chancellor. Decree for the petitioner. The petitionee appealed. The opinion fully states the case.

W. H. Davis for the petitionee.

The Legislature could not enact a law sustaining V. S. 2646 in favor of one person and not in favor of another. *Holden* v. *James,* 11 Mass. 397; *King* v. *Tennessee,* 3 L. R. A. 210; *Tillman* v. *Cook,* 9 Baxter (Tenn.) 429; Cooley on Const. Lim. 558; *Lewis* v. *Webb,* 3 Me. 326.

The discretion to regulate property rights between husband and wife is a legislative discretion, and must be exercised by the Legislature. Art. 3 Amend. Vt. Constitution; *Noel* v. *People,* 187 Ill. 587; *State* v. *Young,* 29 Minn. 474; *Smith* v. *Shather,* 68 Cal. 194; *In Re Village of No. Milwaukee,* 93 Wis. 616; *City of Galesburg* v. *Hawkinson,* 75 Ill. 152; *Merrill* v. *Sherburne,* 1 N. H. 203.

The law in question is invalid because it clothes the court with the arbitrary power to deprive a person of his property. *Mayor of Baltimore* v. *Radecke,* 49 Md. 217; *Noel* v. *People,* 187 Ill. 587; *Yick Wo* v. *Hopkins,* 118 U. S. 354; *In Re Wo Lee,* 26 Fed. Rep. 471; *King* v. *Tenn.,* 3 L. R. A. 210; *Tillman* v. *Cook,* 9 Baxter (Tenn.) 429; *City of Galesburg* v. *Hawkinson,* 75 Ill. 152.

William H. Bliss for the petitioner.

STAFFORD, J. The question is whether No. 49 of the Acts. of 1896 is constitutional. It provides that "the court of chancery, in its discretion, upon the petition of a married woman, may empower her to convey her real estate by separate deed" as effectually as if the deed were executed by herself and her husband.

In the present case the petition set forth the marriage of the petitioner to the petitionee, that the petitioner was then the owner in fee simple of a piece of land described, that

since her marriage she had bargained the land to a party named and needed the proceeds for her support and to meet her obligations, and thereupon prayed for authority under said act. These, so far as the case shows, were the only averments in the bill. There was an answer, but there is nothing before us to show what it contained. The cause was referred to a special master to hear and determine the issues of fact; and the master having heard the testimony made his report to the court of chancery. The printed case purports to give the substance of the findings, as well as certain concessions, from which it appears that the parties were married in 1899, that the petitioner then owned the land described in the petition, holding the same by ordinary conveyance and not to her sole and separate use; that the parties lived together for about a year and since that period have lived apart in the circumstances and for the reasons stated by the master, which need not be noticed further than to say that they seem to show a case of separation begun and continued through the fault of the husband; that the property, free of incumbrances, is worth about nine hundred dollars ($900); that the husband brought a petition for divorce which was dismissed, and that the wife brought one which was discontinued; that she bargained the land and that the petitionee refused to join in the deed. The cause was heard in the court of chancery upon the report and the petitionee's exceptions thereto—what the exceptions were does not appear—and a decree was entered empowering the petitioner to convey the real estate by her separate deed "pursuant to the provisions of No. 49 of the acts of 1896," from which decree this appeal was taken. It will be observed that the petition is brought and the decree rendered strictly under and pursuant to the act in question. The petition does not attempt to make a case under the provisions of Vt. St.

2650, nor does the court of chancery treat the case as arising thereunder. That statute provides that when a married man is incapacitated by intemperance, insanity or otherwise for supporting his family, or deserts, neglects, or abandons his wife, or by ill usage or criminal conduct gives her cause to live apart from him, the chancellor may upon her petition, if she is of full age, authorize her to sell and convey her real estate or any personal estate which came to the husband by reason of the marriage. How the case might have stood under that enactment, we have, for the reason stated, no occasion to inquire. Even in this court the petitioner's counsel does not rely upon or even refer to that provision.

If the decree is valid what is its effect? We are still living under the common law rule which gives the husband a freehold estate for the joint lives of himself and his wife in her lands which she held at the time of her marriage except such as she held to her sole and separate use. In this land, therefore, the petitionee has such a freehold interest. In that sense and to that extent it is his estate. He is entitled to the rents and profits thereof. *Deitrich* v. *Hutchinson,* 73 Vt. 134, 50 Atl. 810; *Hanchett* v. *Moxly,* 68 Vt. 210; 34 Atl. 949; *Chapman* v. *Long,* 66 Vt. 656, 30 Atl. 3.

Such estate is still recognized and protected by statute, for, the wife may not convey nor mortgage her real estate except by deed duly executed by herself and her husband. Vt. St. 2646. The effect of the decree, then, is to deprive the husband of his estate. This of course cannot be done without due process of law. U. S. Const. 14th Amend., Sec. 1. Does the act in question provide or contemplate due process of law? It declares that the husband's estate may, in effect, be taken from him and bestowed upon the wife, upon her petition, by the court of chancery "in its discretion." Legitimate judicial

discretion is, without doubt, due process of law. Consequently the exact question is whether the power attempted to be vested in the court of chancery is a permissible instance of judicial discretion. Many attempts have been made to define the term and there is no harmonizing the results. See 6 Enc. Pl. & Pr., 819, title Discretion; same work, vol. 2, pp. 409-420, title Appeals, and 9 Am. & Eng. Enc. of Law, p. 473. One court treats it as nothing more than the power to determine finally and without appeal upon the question of fact, treating the legal rule as settled and binding. *Bundy* v. *Hyde,* 50 N. H., 120. Another declares that it can have no meaning whatever unless it extends to the determining of the rule of law itself and be recognized as final and conclusive in that respect also. *Judges* v. *People,* 18 Wend. 99. Others treat it as a freedom to determine both the rule and the fact within certain bounds, which bounds are inviolable, and are not to be overpassed without redress. All agree that by judicial discretion is never intended the whim or caprice of the magistrate, nor a course of judicial action inconsistent with itself in dealing with cases essentially alike. It is the essence of all law that when the facts are the same the result is the same. It is always necessary in the decision of a matter in court that the judge should have in mind first a rule or standard, and second the facts which are to be tested thereby. But certain matters seem hardly to admit of the formulation of inflexible rules in advance and to be most wisely left to the sound judgment of the magistrate when the exigency shall arise, leaving him to be governed by the general analogies of the law and his own sense of justice. The better view seems to be that even in these instances he is not altogether a law unto himself, but may be overruled if his action is such as to shock the universal, or the common, sense of what is right

among his fellows. All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and to be abused when it plainly overpasses these bounds. See an article entitled "Judicial Discretion," 17 Am. Law Rev. 569; Sir John Romilly's opinion, 17 Eng. Rul. Cas. 823; *Gardner* v. *Jay,* 29 Ch. D. 52, 3 Eng. Rul. Cas. at pp. 251 and 252. The deposit of discretion is most usually found in matters of procedure and the conduct of trials, where not only would it be difficult to prescribe exact and minute regulations, but where the situation itself is not easily reproduced in its original character, and cannot safely be reviewed. Such are questions concerning the latitude of cross-examination, the course of argument, within certain bounds, questions of continuance and frequently of new trials, questions of the right to amend or withdraw pleadings, whether actions should be consolidated, whether and when election between counts should be compelled, questions of contempt in the presence of the court, and the like. Instances are not wanting however in the field of substantive law. Whether specific performance shall be decreed is said to be a matter of discretion, but the rules governing the exercise of the discretion have become so well fixed and understood that the conditions determining the right to a decree are almost capable of being stated in the form of a rule. 3 Pom. Eq. Jurisp., S. 1404; *Fowler* v. *Sands,* 73 Vt., 237, 50 Atl. 1067. We are not aware of any instance where the law has attempted to subject the right of a person to retain his estate to the decision of a magistrate unguided and unregulated save by his own sense of fairness and justice. The grant of discretionery power in the legal sense apparently implies the existence of certain well understood principles within which it should be exercised. But when a statute declares that a hus-

band's property may be taken from him and bestowed upon his wife in the discretion of the chancellor, what are the well understood principles which are to govern him in the exercise of his discretion? In the statute referred to above (Vt. St. 2650) the legislature undertook to lay down the law upon that very subject, carefully defining the circumstances in which a wife might be given the authority now asked for. When the chancellor is bidden to exercise his discretion beyond and regardless of these circumstances, how is he to judge? He has no law to govern him because the law is against divesting the husband of his estate. Is he to make a law? Is he to formulate a rule governing such cases? Then he becomes the legislature for that case. And is one chancellor to make one rule and another chancellor a different rule? Then we live under a government of men, not laws. Is it a case for the exercise of discretion, or is it not rather a field wherein the rights of men and women must be regulated by positive law? Is it not too much to ask that one's right to hold his estate should be made to depend upon its appearing fair and just to a chancellor that he should do so, merely in view of the circumstances existing between himself and another?

Analogous cases are to be found. A statute attempting to give the judge in criminal trials authority to keep the jury together or permit them to disperse, in his discretion, has been held void. *King* v. *Tennessee,* 3 L. R. A., 210. An ordinance forbidding the use, upon certain streets, of heavy vehicles without the special permission of a board, was held unreasonable and void as failing to prescribe conditions upon which the permission should be granted and leaving it to the arbitrary will of the officers. *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9, 26. Similar cases are: *City of Plymouth* v. *Schulthesis,* 135 Ind. 339; *Mayor* v. *Radecke,* 49 Md., 217, 33

Am. Rep. 243; *Noel* v. *People,* 187 Ill., 587; *In re Wo Lee,* 26 Fed. Rep., 471; *Yick Wo* v. *Hopkins,* 118 U. S. 354.

In our opinion, to take one's property under a statute like the present is to deprive him thereof without due process of law, and accordingly we hold that acts of 1896, No. 49, is unconstitutional and void in that it undertakes to clothe a court with power to deprive a property owner of his estate without making the exercise of the power to depend upon proof of any prescribed facts, but leaving it to the arbitrary and unregulated will of the magistrate.

Decree reversed with costs in this Court, and cause remanded with mandate that the bill be dismissed.

STATE *v.* EUGENE SARGOOD and JOHN DOYLE.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, STAFFORD, and HASELTON, JJ.

Opinion filed September 15, 1904.

Criminal Law—Poisoning Animals—Principal and Accessory—Joint Trial—Evidence — Motive — Other Crimes — Relevancy — Witnesses — Competency — Wife of Co-Respondent—Request to Charge—Exceptions—Scope.

The fact that the respondent has committed a crime other than the one charged is usually deemed to be irrelevant, but it is relevant when it tends to prove the existence of a motive, plan, or purpose which would naturally prompt the respondent to commit the crime charged, though it does not appear that, when the crime charged was committed, the purpose to commit the other was already formed.

When, in the prosecution of two persons for poisoning certain colts, the evidence of the State tends to show that the respondent who did the poisoning acted as the mere tool of the other, who instigated the poisoning for the purpose of paying a grudge against the owner, and also to enable him to charge the poisoning against a certain woman whom he desired to be rid of because she baffled his business plans, evidence that shortly after the colts were poisoned he placed poison where it would be likely to be taken by this woman or her husband, and either she be poisoned or charged with poisoning her husband, is admissible as tending to show that said respondent was actuated by a motive, or had a plan, which would naturally prompt him to commit the crime charged.

In a joint prosecution of two persons for poisoning certain colts, when the State claims that the poisoning was instigated by one respondent in order to pay a grudge against the owner, and its evidence tends to show that, before the poisoning, and in October 1902, when that respondent was requested not to sell the owner any more liquor, he replied, with an oath, that he would get even with the owner for going back on him; evidence that more than once in the fall of 1902, said respondent furnished the owner liquor is admissible, it being conceded that he had no authority to sell.

When, in the joint prosecution of two persons for poisoning certain colts, the State claims that the respondent who did the poisoning acted as the mere tool of the other, evidence that the former in the month following that in which the colts were poisoned, stated to one to whom he offered some liquor that he got it from the other respondent who did not dare to refuse him anything, is admissible against the respondent who is claimed to have said so.

When, in the joint prosecution of two persons for poisoning certain colts, the evidence tends to show a conspiracy between them, and both are convicted, if the jury is properly instructed touching their joint conviction, errors in instructions with reference to their separate convictions are harmless.

When, in the joint prosecution of two persons for poisoning certain colts, the evidence of the State tended to show that the respondent who did the poisoning acted as the mere tool of the other, and the State based its case on that theory, and the whole charge of the court touching a joint conviction proceeded on that theory, which implies the necessity of a common understanding, and no other theory of a joint conviction was presented by the charge, it was not error to refuse to expressly charge that both respondents

could not be convicted unless there was a concert of action or a common understanding.

A general exception to the charge on a specified subject is bad, unless the charge on that subject is wholly unsound.

When the court charges fully and correctly with reference to the necessity of finding that respondent's admission to a detective must have been made understandingly, before it can be used as evidence against him, it is not error to refuse to charge that the respondent cannot be convicted on such admission, if he was intoxicated at the time, and the intoxication was procured by the detective for the purpose of getting the admission.

Where two defendants are jointly indicted and tried for the same offence, the wife of either is incompetent to testify in their favor.

INFORMATION for poisoning colts. Plea, not guilty. Trial by jury at the September Term, 1903, Bennington County, *Watson*, J., presiding. Verdict, guilty; and judgment thereon. The respondents excepted. The opinion fully states the case.

Batchelder & Bates and *D. A. Guiltinan* for the respondents.

The evidence that Sargood had furnished intoxicating liquor to Blair was inadmissible, as was also the evidence that, after the colts were poisoned, Sargood attempted to poison Hicks and his wife. These were crimes entirely disconnected from the crime charged, and the evidence tended only to prejudice the jury against Sargood. *State* v. *Smalley*, 50 Vt. 736; *State* v. *Kelley*, 65 Vt. 531; *State* v. *Valwell*, 66 Vt. 558; *People* v. *Gibbs*, 93 N. Y. 470; *Coleman* v. *The People*, 55 N. Y. 81; *People* v. *Corbin*, 56 N. Y. 363; *People* v. *Sharp*, 107 N. Y. 427; *People* v. *O'Sullivan*, 104 N. Y. 481; *Com.* v. *Robinson*, 146 Mass. 202; *People* v. *Foley*, 64 Mich. 148; *State* v. *Bridgman*, 49 Vt. 202; *State* v. *Kelley*, 65 Vt. 531; *State* v. *Totten*, 72 Vt. 73; *State* v. *Hopkins*, 50 Vt. 316;

Reed v. *Spaulding*, 42 N. H. 118; *Brock* v. *State*, 26 Ala. 104; *State* v. *Freeman*, 4 Jones (N. C.) 105.

J. J. Shakshober, State's Attorney, *O. M. Barber* and *F. C. Archibald* for the State.

The evidence tending to show that Sargood attempted to poison Hicks and his wife, was admissible. It comes within the exception to the general rule, viz.: "The prosecutor may show motive, purpose, preparation or concealment, though it involves the proof of a distinct crime." Wills Circumstantial Ev. 61; *State* v. *Kelley*, 65 Vt. 531; *State* v. *Eastwood*, 73 Vt. 205; *Strong* v. *State*, 44 Am. Rep. 293; *People* v. *Ebanks*, 40 L. R. A. 278; *State* v. *Wentworth & Stone*, 37 N. H. 196; *Pierson* v. *People*, 79 N. Y. 424.

The evidence that Sargood had, without authority, sold Blair intoxicating liquor was admissible, in connection with the evidence that Sargood later had threatened to get even with Blair for going back on him. The evidence tended to show a motive for poisoning the colts. *State* v. *Chase*, 68 Vt. 405; *State* v. *Ward*, 61 Vt. 153; Beers' Stevens' Digest of Ev. Art. 7, p. 20; *State* v. *Dearborn*, 59 N. H. 348; *State* v. *Palmer*, 65 N. H. 216; *Murphy* v. *People*, 63 N. Y. 590; *Pierson* v. *People*, 79 N. Y. 424; *Com.* v. *Merriam*, 14 Pick. 518; *Com.* v. *Choate*, 105 Mass. 451.

When circumstantial evidence is relied upon for conviction, any fact which bears upon the guilt or innocence of the respondent, immediate or remote, and occurring at any time, is proper for the consideration of the jury. *State* v. *Chase*, 68 Vt. 405; *State* v. *Burpee*, 65 Vt. 1; *State* v. *Marsh & Buzzell*, 70 Vt. 288; *State* v. *Noakes*, 70 Vt. 247; *Holmes* v *Goldsmith & Co.*, 147 U. S. 150; *Thiede* v. *Utah*, 159 U. S. 510; *Fitzpatrick* v. *U. S.*, 178 U. S. 304.

STAFFORD, J. The respondents were charged with having killed with poison two colts belonging to a neighbor. They were tried together and convicted and the case is here upon exceptions taken during the course of the trial.

Upon the part of the State a story was developed substantially as follows: In the small village of East Arlington lived Sanford Hicks and his wife, occupying a house upon the street. On the same premises was a barn in which Blair, who lived near by, kept the colts under an arrangement with Hicks. In the same village lived Sargood, one of the respondents. The other respondent, Doyle, was in and about the village more or less. Sargood was ambitious to get the Hicks place and turn it into a hotel where he might sell liquors under a license to be procured from the authorities. He had succeeded in his negotiations so far as Hicks himself was concerned, but had found his plan blocked by Mrs. Hicks, whose consent was necessary and could not be obtained. Sargood had been selling liquor to Blair in violation of law, and believed, as he expressed it, that "Blair had gone back on him," and so he was bent on "getting even with Blair." Doyle had no apparent interest in Sargood's plan in respect to the Hicks house, and no ill will against Blair. He was friendly to Sargood and not unwilling to please him. On the third day of April, in the afternoon, Blair discovered that his colts were sick; the next day they were worse and were found to have been poisoned with paris green, some of which remained in their feed boxes. They died the morning of the next day, which was Sunday, the fifth. Detectives were employed and some time later procured an admission from Doyle, while he was in liquor, that the poisoning had been done by him at the instigation of Sargood. Very soon after the colts were poisoned Sargood attempted to direct suspicion towards Mrs.

Hicks and advised Blair to have her arrested. In this he did not succeed. Sunday, the fifth, he went to the Hicks house and was in the kitchen where a considerable number of unwashed dishes had accumulated upon the table. Into some of the teacups, the circumstances tended to show, he put poison so mixed as to resemble tea, hoping that Mrs. Hicks would be poisoned and so removed from his way, or else that her husband would be poisoned and the crime laid at her door and the same result accomplished. Hicks did take some of the poison into his mouth but detected it before it was swallowed. No witness testified to seeing the poison placed in the feed boxes or in the teacups. The theory advanced by the State was that Sargood was the moving spirit throughout and that Doyle was his tool; that Sargood was moved by the desire to get rid of Mrs. Hicks's opposition and caused the colts to be poisoned with the hope and expectation that Mrs. Hicks would be held responsible and, failing in this, attempted the poisoning of the Hickses themselves; that incidentally he was gratifying his grudge against Blair, but that his principal motive was the ulterior one just stated.

One of the chief exceptions is that which was taken to the admission of any and all evidence touching the attempted poisoning of the Hickses. This evidence, it is urged, was irrelevant as tending to establish a distinct crime unconnected with the one charged. On the other hand it is claimed by the State to be relevant as tending to establish a motive for the crime charged and to identify Sargood as the criminal. It is all a question of relevancy. That the accused has committed another crime is usually irrelevant. It is relevant only when it tends to prove that he committed the crime charged. It does tend to prove that he committed the crime charged when it tends to prove that he was actuated by a motive, or enter-

tained a plan or purpose, which would naturally prompt him to commit it. Here the second crime followed close upon the heels of the first. If it was committed by Sargood it tended to establish and make clear the motive he had for poisoning the colts, which, without it, might seem doubtful and obscure, and so tended to identify the culprit. We do not understand that it is necessary that when the first crime was committed the purpose to commit the second should be already formed and entertained. It is enough if the commission of the second is so related to the first as to shed a light upon it which may enable the trier to see how, why, or by whom it was committed. We think that the evidence was relevant and admissible. The authorities upon the subject may be found collected and reviewed in an extended note to *People* v. *Molineux*, 62 L. R. A. 193; also in 12 Cyc. 405-411.

Webb, the father-in-law of Blair, had testified to requesting Sargood, in October, 1902, not to sell Blair any more liquor, and to Sargood's replying with an oath that he would get even with Blair for having gone back on him. Afterwards Blair was allowed to testify that more than once in the fall of 1902 Sargood had furnished him liquor; it being conceded that Sargood had no authority to sell. This testimony of Blair's came in against exception, and under that exception it is now urged that it did not appear that the furnishing was before the conversation testified to by Webb. The exceptions as amended, however, make it clear, especially in view of the argument which took place in the court below, that the offer was to show that Sargood "*had been* letting Blair have intoxicating liquor," that is to say, had been letting him have it before the time of the Webb-Sargood conversation. That was the offer upon which the court passed. The evidence as given was

not excepted to for failing to come within the offer, and although it was not in terms limited to the time preceding the conversation, the jury might find from it that the occasions of furnishing really were previous.

In the July following the April in which the colts were poisoned, Doyle had offered Blair a drink of whiskey out of a bottle. Blair had asked him where he got it and he had replied, "Of Sargood." Blair then expressed his surprise that he could get it of him; whereupon Doyle said, "I can get what I want of Sargood; he dare not refuse me anything." Sargood had no authority to sell whiskey at that time. This evidence was admitted as against Doyle alone over the exception of both respondents. We think it was admissible as having some tendency to show that Doyle was the one who did the poisoning for Sargood, if the jury should find, as they might upon other testimony, that Sargood was at the bottom of the business. Evidence admissible against one only of the respondents was in this and other instances properly received, its use by the jury being duly guarded and restricted by the court. *State* v. *Cram*, 67 Vt. 650, 32 Atl. 502.

Among the dishes on the table in the Hicks kitchen was a tumbler containing poison, and the evidence tended to show that the tumbler, which was of an unusual pattern, was like others which Sargood had in his house. Sargood's wife was offered as a witness by both respondents to show that there had been no such tumbler in her husband's house. She was excluded as incompetent. The evidence of the State did not tend to connect Doyle with the attempted poisoning of the Hickses; still, any evidence which tended to show that Sargood had no hand in poisoning the colts would have helped Doyle, because the theory was that Doyle was only a tool, having no personal hostility to Blair; so we cannot agree with

the State's counsel that this evidence, if coming from a competent witness, would not be evidence in favor of Doyle. But the ordinary common-law rule, which prevails with us, prevents a respondent from introducing as a witness the wife of a co-respondent just as it prevents the introducing of his own. Stephen's Digest of Ev. Art. 108. If an exception exists where the respondents sever in their pleas and stand upon independent grounds and the offered evidence relates solely to the defence of the respondent who is not the spouse of the offered witness, such was not the situation here. The respondents were indicted and tried jointly and the offered evidence would have been even more pertinent and helpful to Sargood than to Doyle. See note to *State* v. *Boyd*, 27 Am. Dec. at p. 379; *State* v. *Bridgman*, 49 Vt. 202.

For similar reasons the wife of Doyle was properly excluded.

The offer to show that on a certain occasion Mrs. Hicks drank and gave Doyle to drink of whiskey was properly excluded as immaterial. We do not state the point more fully because it is a mere question of connection and furnishes no illustration of the law that could be useful hereafter. The same reason leads us to dispose of another exception in the same way, namely, that which was taken to the exclusion of the offer to show that Mrs. Hicks before her marriage to Mr. Hicks had sometime complained of him to a justice of the peace.

The exception to the action of the Court in permitting the State, upon re-examination of O'Brien, to clear up a point in his testimony which respondents' counsel had thrown into momentary confusion upon cross-examination, need not claim our attention further than to remark that the question presented by the respondents' brief is not the question presented by the bill of exceptions.

The testimony referred to in the bill tended to show a conspiracy and understanding between the respondents, and that Sargood was an accessory, and so sustained the charge of the Court in that respect. The Court charged that either respondent might be convicted alone or that both might be convicted. A request was made to charge that both could not be convicted unless there was concert of action or a common understanding, and an exception was taken to the claimed omission to comply. An exception was also taken to the charge that either might be convicted without the other, the ground of the exception being that the State had put its case upon the theory that Doyle did the poisoning, although he did it for Sargood, so that Sargood could not be guilty unless Doyle was. So far as the latter exception is concerned it may be disposed of by saying that the verdict found both guilty and if they were found guilty upon proper instructions touching a joint conviction the charge upon the subject of separate convictions, even if it was erroneous, could not have been harmful. It thus becomes necessary to inquire whether the charge was correct and sufficient touching a joint conviction.

The position of the respondents now is that the jury was told that there was evidence upon which it might convict Doyle alone and evidence upon which it might convict Sargood alone, and that it was left at liberty to convict the two jointly upon this evidence which tended to show each guilty independently of the other. The answer of the State is that the charge was a virtual compliance with the request. The request was not expressly complied with. In no part of the charge was the jury explicitly told that it could not convict both respondents in the absence of proof of a common understanding. The only part of the charge that deals with the subject of a joint conviction proceeds upon the theory, already

referred to more than once, that Doyle was the actual agent in the poisoning and that Sargood aided, advised or encouraged him therein. The charge upon this subject implies, throughout, the necessity of a common understanding, and no fault is found with it in this respect. No other theory of a joint conviction was presented by the charge, and it is repeatedly stated in the respondents' brief that this was the theory upon which the State rested its case. How, then, could the jury have understood that it was at liberty to convict both respondents upon the theory that each, acting independently of the other, without any common understanding, and one of them without any motive of his own, had gone about to poison the colts, and had actually poisoned them to death? That would be a story so strange and improbable as certainly to require very clear demonstration in proof and we should not be likely to find the recital of the trial entirely silent in regard to it. We cannot set aside the verdict upon the conjecture that it may have had such a basis under this charge. The jury must have understood that the only basis for a joint verdict was the one which is singly, fully and accurately stated,—the ground upon which the State had sought to put itself throughout the trial.

The respondents excepted to what the court said in its charge "about the testimony of the respondents before the grand jury, and its effect if they testified differently there from what they did on this trial." What the court said upon this subject is contained in two separate paragraphs and in substance was that if either of them testified differently there from what he did before the petit jury, it impeached him as a witness, affected his credit, to some extent, (how much, the jury was to say) and also constituted a piece of evidence in the nature of an admission that the fact was as then stated

instead of being as stated on trial; but that such contradiction affected only the one as to whom it was proved. The exception did not point out the fault which the respondents found with the statement of the rule but simply excepted to what the court said upon that subject as a whole. It is now claimed that there was an unsoundness in that it declared that the contradiction impeached instead of declaring that it tended to impeach; it being for the jury in all cases to say whether the contradiction does really affect the credit of the witness. If this was the point of the exception it should have been made specific at the time, when the learned judge might have reconsidered the expression. As it was, we have no reason to suppose that his attention was drawn to it. The party having veiled his objection under a general exception must be judged by the rule which pronounces the exception bad if the proposition excepted to deals with several matters, unless it is unsound as to all.

The court was requested to charge that Doyle could not be convicted merely upon the evidence of his own admission made to the detective, if Doyle was intoxicated and the intoxication was procured by the detective for the purpose of getting the admission. The request was properly refused, the court charging fully and correctly touching the necessity of the admission being understandingly made, which was the only legal importance attending the question of intoxication.

Judgment that there is no error in the proceedings of the County Court, and that the respondents take nothing by their exceptions. Let a mittimus issue and execution be done.

Start, J., dissents.

STATE *v.* SCAMPINI.

January Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed November 15, 1904.

Intoxicating Liquors—Illegal Sales—Criminal Pleadings—Information—Negation of License—Time and Place—Sale by Wholesalers—License Commissioners—Powers—Action on Bond of Licensee—Effect on Criminal Prosecution—Judicial Notice—No. 90 Acts 1902—Construction—Constitutional Law—Referendum—Delegation of Legislative Powers—Equal Protection of Laws—Statutes—Unconstitutional in Part.

No. 90, Acts 1902, relative to traffic in intoxicating liquors, which provides for a referendum, does not thereby unconstitutionally delegate legislative powers to the people.

Courts are bound to take notice of every public statute, and of the facts therein recited or stated, including the time at which they take effect.

The constitutionality of an act cannot be contested by one whose rights it does not affect, and who therefore has no interest in defeating it.

Under No. 90, Acts 1902, one who sells intoxicating liquor without a license, or in a manner not authorized by his license, is guilty of a crime, regardless of whether the license commissioners represent the leading political parties; hence he cannot assail the constitutionality of the provision that the license commissioners shall be three persons representing the two leading political parties.

Under No. 90, Acts 1902, it is no defence to a seller without a license that the city or town did not vote "license," or that there were no license commissioners to whom application for a license could be made.

In an information charging a statutory crime, a negative averment may be in the words of the statute, or in words of equivalent meaning.

Under § 68, No. 90, Acts 1902, providing for the punishment of one who furnishes or sells liquor "without first procuring a license," an information negativing the fact of respondent's license in the words of the statute, and containing other counts charging selling "without first procuring a license to sell intoxicating liquor, except at wholesale," and selling at retail "without having a license so to do," is sufficient.

The technical certainty in alleging time and place, which is demanded in indictments for felonies, is not required in indictments for misdemeanors.

In indictments, negative averments need not be stated with time and place.

An information charging the sale of liquors without first having procured a license, in violation of No. 90, Acts 1904, need not allege that respondent "then and there" had no license.

Repugnancy between the counts of an information is no ground of demurrer.

In the construction of a statute, the general rule is that the cardinal purpose of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious.

Under No. 90, Acts 1902, a person having a license of the fourth class, can sell liquor only to persons holding a license to sell directly to consumers, and the liquor must be sold to such licensees for that purpose; all other sales are at retail, and not within the terms of a license of the fourth class, irrespective of the quantity sold.

An information against the holder of a fourth class license, under No. 90, Acts 1902, charging him with selling a pint of whiskey to one who had no license, sufficiently alleges that the sale was not at wholesale, and was in violation of said act.

An information against a holder of a fourth class license, under No. 90, Acts 1902, charging him with selling whiskey at "retail," sufficiently charges a crime under said act.

Under No. 90, Acts 1902, the license commissioners have judicial power in respect of the revocation of licenses; but they are not the sole prosecuting officers for instituting proceedings for violations of the act, nor is it necessary, as a condition precedent for instituting criminal proceedings for illegal sales of liquor by a licensee, that preliminary proceedings shall first be begun before the license commissioners.

The fact that a licensee is liable on his bond for any violation of the conditions or prohibitions of his license does not protect him from prosecution under No. 90, Acts 1902.

In a prosecution for selling liquor "without a license then in force," in violation of No. 90, Acts 1902, the words "then in force" do not affect the force of the averment, and are immaterial.

When an information for selling liquor without a license contains a sufficient negation of the license, other negations in the same count for the same purpose, whether argumentative or otherwise, are mere surplusage.

Under an information charging respondent with selling "intoxicating liquor" without a license in violation of No. 90, Acts 1902, evidence tending to show an unlicensed sale of anything classed by the act as "intoxicating liquors" is admissible.

On questions arising under the Federal Constitution, the decisions of the Supreme Court of the United States are binding upon this Court.

That part of § 21, No. 90, Acts 1902, which excepts from the provisions of the act sales by the barrel, by the manufacturers thereof, of cider manufactured in this State, and sales by the barrel by farmers who raise apples to make the cider which they sell, if it is not drunk on the premises, and sales by the makers thereof of native wines manufactured in the State and not to be drunk on the premises, is, so far as it discriminates in favor of farmers and manufacturers of cider and native wines, a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States; still the act is not thereby rendered totally void, only so much of the act is void as makes any person liable for selling cider by the barrel not to be drunk on the premises, or for selling wine not to be drunk on the premises.

When a part of a statute is unconstitutional, the statute is not thereby rendered totally void unless all its provisions are so connected and interdependent that it cannot be presumed that the Legislature would have enacted one provision without the other.

INFORMATION for selling intoxicating liquor without a license in violation of No. 90, Acts 1902. Heard on general and special demurrer to the whole information, and to each count thereof, at the September Term, 1903, Washington

County, *Stafford,* J., presiding. Demurrers overruled, *pro forma.* The respondent excepted. The opinion fully states the case.

J. W. Gordon, R. A. Hoar, H. W. Scott and *William Wishart* for the respondent.

The information should allege that the people of the city of Barre had voted "Yes" under § 2, of the act. The court will not take judicial notice of the result of that vote. *Com.* v. *Green,* 98 Ky. 21; *Taylor* v. *Com.,* 40 So. W. Rep. (Ky.) 383; *Whitman* v. *State,* 80 Md. 410; *People* v. *Murphy,* 93 Mich. 41; *State* v. *Mackin,* 41 Mo. App. 99; *State* v. *Sorrell,* 98 N. C. 738; *Lowery* v. *State,* 34 So. W. Rep. 956; *Grider* v. *Tally,* 77 Ala. 422, 54 Am. Rep. 68; *Butler* v. *State,* 25 Fla. 374; *Seifried* v. *Connor,* 101 Pa. St. 202.

The referendum provisions of the act are unconstitutional. *Rice* v. *Foster,* 4 Har. 479; *Parker* v. *Com.* 6 Pa. St. 507, 47 Am. Dec. 480; *Mayes* v. *State,* 4 Ind. 343; *Meshir* v. *State,* 11 Ind. 482; *Barto* v. *Nimrod,* 8 N. Y. 483; *Santo* v. *State,* 2 Ia. 165, 63 Am. Dec. 487; *State* v. *Weir,* 30 Ia. 134, 11 Am. Rep. 115; *State* v. *Armstrong,* 3 Sneed 634; *Minn.* v. *Simonds,* 32 Minn. 540; *Ex parte Wall,* 48 Cal. 279, 17 Am. Rep. 425.

The discriminating provisions of § 21 make the act void, as class legislation. *State* v. *Cadigan,* 73 Vt. 245; *State* v. *Shedroi,* 75 Vt. 277; Cooley's Con. Lim. 391; *Connelly* v. *Union S. P. Co.,* 184 U. S. 540; *Cotting* v. *Stock Yards Co.,* 183 U. S. 79; *Weil* v. *Calhoun,* 25 Fed. 865; *Ex parte Kennebrew,* 35 Fed. 52; *State* v. *Montgomery,* 94 Me. 192; *Monmouth* v. *People,* 183 Ill. 634; *McCreary* v. *State,* 73 Ala. 480; *State* v. *Marsh,* 37 Ark. 356; *State* v. *Deschamp,* 53 Ark. 490; *Webber* v. *Va.,* 103 U. S. 344.

John H. Senter, State's Attorney for the State.

WATSON, J. The respondent is informed against by the state's attorney for the unlawful sale of intoxicating liquor. The information contains eight counts. A general and special demurrer is interposed to the whole information, and also to each count. The information is based upon section sixty-eight of No. 90, Acts of 1902. The act was approved December 11, 1902. Therein it is provided, "Sec. 100. This act shall take effect on the first Tuesday of March, A. D., 1903, provided that if a majority of the ballots to be cast as hereinafter provided shall be No, then this act shall take effect the first Monday in December, 1906; but as to sections 101, 102 and 103, this act shall take effect from its passage." "Sec. 101. The officers of every town or city whose duty it is to call a meeting of the legal voters of their respective towns or cities, shall call a special meeting according to the statutes made and provided, on the first Tuesday of February next, providing for an opportunity of the freemen of this state to express their judgment and choice in regard to this act by depositing their ballots in a box to be provided for that purpose by the presiding officer of such meetings respectively, with the words 'Yes' and 'No' written or printed thereon, and the return of the votes on this question shall be made by the clerks of the several towns and cities to the county clerks of their respective counties within twenty-four hours from the adjournment of such special meeting in their respective towns, and the several county clerks shall, within forty-eight hours, canvass the votes so returned, and shall forthwith certify and return to the secretary of state a statement of such canvass of the vote so returned to them."

"Sec. 102. On the thirteenth day of February next the secretary of state shall canvass the returns so made to him by

the county clerks, and shall within two days thereafter issue his proclamation certifying the result of such vote, and declaring the time when the provisions of this act shall take effect."

"Sec. 103. All regulations provided by law for conducting freemen's meeting shall be applicable to the votes provided for on the referendum as provided for in section 101 of this act."

It is contended that by the provisions of these sections there is such a delegation of legislative power as renders the act unconstitutional. But with this contention we cannot agree. In answer to inquiries by the Governor the judges of the Supreme Court expressed the opinion that sections 100, 101, 102, and 103 took effect from the passage of the act, December 11, 1902. Except certain sections which were governed by special provisions, the act was to take effect as provided in section one hundred. The time there specified is the first Tuesday of March, 1903, unless a majority of the ballots cast by the legal voters under the provisions of section one hundred and one should be No, in which event it is the first Monday in December, 1906. Hence the Legislature gave life to the act regardless of the votes of the people, and it took effect on the former date contingent only upon the fact that a majority of such votes should be in the negative in which case the time was postponed to the latter date. The law by its terms was to become operative in any contingency. It is unnecessary to look outside of our own State for authorities, for the same question has been decided by this Court. The act of 1852, entitled "An Act to Prevent Traffic in Intoxicating Liquors for the Purpose of Drinking," contained a provision for the vote of the people to be taken in the same way and with like effect. In *State* v. *Parker,* 26 Vt. 357, it was

urged that by reason of this provision the law was unconstitutional. But upon a careful review of the authorities and a full consideration of the case, it was held to be within that class of statutes where the time of taking effect is made to depend on a future contingent event, and therefore valid. We treat the decision in that case as determinative of the question now before us.

Nor was an allegation of the time when the act took effect necessary; for courts are bound to take notice of every public statute and the facts they recite or state. 1 Chit. Pl. 215; *Richardson* v. *Fletcher,* 74 Vt. 417, 52 Atl. 1064. This principle of law is none the less applicable where the time of a statute's becoming operative depends upon the result of a popular vote, to be declared together with the time when the act shall take effect by proclamation issued by the secretary of state as is provided in the law under consideration. *Slymer* v. *State,* 62 Md. 237; *Jones* v. *State,* 67 Md. 256.

By section 2 every town was required to vote at its town meeting held on the first Tuesday of March, 1903, and annually thereafter, whether licenses should be granted for the sale of intoxicating liquors therein, and if a town voted in favor of license, then, by section 3, the selectmen upon the application of six voters were required to call a special town meeting to determine the kind of license to be issued. By section 4, the licenses issued in such town shall conform to the vote cast and shall be in all respects subject to the provisions of the act. By section 7, when a town votes to issue licenses, the selectmen shall appoint a board of license commissioners consisting of three persons. "One member shall be appointed from each of the two leading political parties, and the third member may also be appointed from one of said parties."

Under the provisions of other sections of the act, this board, when duly organized, upon public hearing, may grant licenses to applicants therefor, pursuant to the vote of the town and within the provisions of the law; but it may at any time refuse to issue a licènse to an applicant whom it considers an unfit person to receive the same. The board of commissioners constitutes an important part of the machinery of the law, and when acting within its provisions, the power to issue licenses or to withhold them from any particular persons, rests exclusively with it.

It is contended that by reason of the provision in section 7. that "One member shall be appointed from each of the two leading political porties, and the third member may also be appointed from one of said parties," the act is unconstitutional. It is said that this is so because the Legislature cannot give preference to members of "leading political parties"; that it is class legislation; and that the Legislature cannot deprive a portion of the freemen of the State of the right to hold office. Here the respondent relies upon Article 8, Chapter 1, of the Declaration of Rights, which provides "that all elections ought to be free and without corruption, and that all freemen, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this Constitution."

Whatever might be said upon this question in a case where it was properly involved, it is clear that the case before us does not legitimately present it.

By section 21 of the act in question, "No person shall furnish or sell or expose or keep for sale any intoxicating liquors except as authorized in this act." Excluding such sales as are, under subsequent provisions of this section, with-

out the operation of the act, unless a town votes in favor of license under the provisions of section 2, or a license of the fifth class is issued to a retail druggist and apothecary by the selectmen under sections 25 and 31, the act is prohibitory. And if a person within the provisions of the act for any reason is not licensed, or if he has a license but sells, exposes, or keeps for sale intoxicating liquor except as therein authorized, he is guilty of a violation of the law regardless of whether the license commissioners, if any, have been appointed from "the two leading political parties" or otherwise. Bishop's Stat. Cr. § 1006; *Lord* v. *Jones,* 24 Me. 439, 41 Am. Dec. 391; *Erb* v. *State,* 35 Ark. 631; *Reese* v. *Atlanta,* 63 Ga. 344. Hence the law requiring the board of commissioners to be constituted as specified in section 7, does not affect the rights of the respondent in this case, and he cannot be heard to complain. The constitutionality of an act cannot be contested by a party whose rights it does not affect and who therefore has no interest in defeating it. Cooley Const. Lim. (7 ed.) 232; *Clark* v. *Kansas City,* 176 U. S. 114, 44 L. ed. 392.

It is urged however that if the provisions relating to a license are constitutional, the information should show that the city of Barre had voted in favor of license, had determined the kind of licenses, and that the selectmen had appointed license commissioners. But such allegations are not essential. It has already been seen that a license can afford the licensee protection only when he keeps within its scope and the law under which it was granted. And it is no defence to a seller without a license that the city or town did not vote license, nor that there were no commissioners to whom application for it could be made. Under the former law the county commissioner was authorized to appoint an agent for any town in the county to sell therein intoxicating liquor to

be used for medicinal, chemical, and mechanical purposes only, and such agent received a certificate from the commissioner authorizing him, as agent of the town, to sell intoxicating liquor for such purposes only. V. S. 4448-4449. This certificate was the agent's license, but if he failed to conform to its provisions and the law under which it was given, he had no protection. In *State* v. *Parks,* 29 Vt. 70, the respondent pleaded his license as such an agent. But it was held that selling or giving away liquors for general purposes of drinking were not within his license and that for such acts of selling or giving away he was liable. See, also, *State* v. *Fisher,* 35 Vt. 584.

Formerly the State of New Hampshire had a statute providing a penalty if any person should at any time, "without license in writing from the selectmen of the town or place where such person resides," sell any liquors therein specified, with a further provision that if the selectmen should unreasonably neglect or refuse to license any suitable person, or in case there were no selectmen in the town or place, the Court of Common Pleas might license such person to exercise the business of a taverner. In *State* v. *Adams,* 6 N. H. 532, the respondent, a resident of the town of Haverhill, was indicted for selling a pint of rum without such a license. On demurrer, the respondent insisted that the indictment was insufficient because it contained no allegation that there were selectmen of that town to grant a license, and because it was not alleged that he had no license from the Court of Common Pleas. In disposing of the particular question, the Court said it was very apparent that if the respondent sold rum, as alleged in the indictment, without a license from the Court of Common Pleas, he was guilty of the offence charged, whether there were or were not any selectmen of Haverhill,

and that therefore an allegation that there were such selectmen would have been wholly superfluous.

It is said that the information does not sufficiently negate that the respondent did not first procure a license to sell the liquor therein mentioned; nor that he did not first procure a license from the license commissioners of the city of Barre to sell the liquor in question; nor the source from which the license could be obtained.

The words of the statute are,—Sec. 68,—"A person who furnishes, sells, or exposes or keeps for sale intoxicating liquors of any kind *without first procuring a license,*" etc. In the first and second counts the negative averments of a license are in the words of the statute. The averment in the third count is "without first procuring a license to sell intoxicating liquor, except at wholesale." The fourth count charges selling by retail, "without having a license so to do." The fifth count charges selling by retail, negativing a license in the words of the statute. In each of the other counts the denial of the respondent's authority to sell as therein charged, is in words substantially like some one of those specifically stated above.

A negative averment may be in the words of the statute, or it may be in words of equivalent meaning. Any negation in general terms covering the entire substance of the matter, will suffice; but it must be as broad as the provision to which it applies. Bish. Stat. Cr. § 1042; *State* v. *Munger,* 15 Vt. 290. And the case of *State* v. *Sommers,* 3 Vt. 156, upon which the respondent relies, instead of being an authority to the contrary directly supports this rule. There the indictment was based upon section 4 of an act passed in 1804 in addition to an act passed in 1798 directing the mode of obtaining licenses and regulating inns and houses of public en-

tertainment. Under the law of those acts a person could obtain a license for keeping an inn or house of public entertainment, from the county court or from any judge of the same. The law also contained a provision whereby the civil authority and selectmen of any town could license any person or persons to mix and sell liquor "on days of general muster, and other public and proper occasions," for the space of three days, without naming or confining the sale to any house or place. The indictment after charging the sale of spirituous liquors contained the negation of authority, "not having a license from the county court within and for said County of Caledonia, nor from any judge of the same, nor from the civil authority and selectmen of said Barnet, to keep an inn or house of public entertainment, in said Barnet." It was held that the limiting words "to keep an inn or house of public entertainment" made the negation too narrow; for the respondent might have had a license and lawful authority "to sell spirits at the time and place he did, but not to keep an inn or house of public entertainment." The Court said that had those limiting words been omitted in the indictment, the sale complained of would have been without license from any legitimate source.

But it is further said that the averments negativing that the respondent had a license are not definite in time and place; that the general words of the statute must be applied specifically to the offence by the words "then and there" or some expression equivalent thereto.

While it is fundamental that material facts in an information or indictment must be alleged with certainty as to time and place, and that in so doing the words "then and there" are usually adopted when the connected acts must be shown to have been done at the same time and place as some

fact before alleged with time and place specifically stated; yet it is equally fundamental that the nicety which requires these words to be cautiously inserted to every material allegation in indictments for felony is not so strictly observed in indictments for misdemeanors. In indictments for such offences if time and place be added to the first act alleged, it shall be deemed to be connected with all the facts subsequently alleged. 2 Hale P. C. 178; 2 Hawk. P. C. ch. 23, § 88; 1 Chit. Cr. L. 221; 1 Arch. Cr. Pr. & Pl. (8th ed.) 257; *Commonwealth* v. *Bugbee,* 4 Gray, 206; *Commonwealth* v. *Doherty,* 10 Cush. 52; *Stout* v. *Commonwealth,* 11 Serg. & R. 177; See, also, *State* v. *Cook,* 38 Vt. 437; *Royce* v. *Maloney,* 58 Vt. 437, 5 Atl. 395; and *State* v. *Corcoran,* 73 Vt. 404, 50 Atl. 1110. Moreover, these averments being negative in character, no time need be stated. 1 Chit. Cr. L. 217; 2 Hawk. P. C. ch. 25, § 79; Com. Dig. Ind. G. 2; Bande's Case, 2 Cro. Jac. 41; *King* v. *Holland,* 5 T. R. 607, 616; Gould's Pl. Ch. III, § 98. And such allegations usually require no venue. Gould's Pl. Ch. III § 164.

It is said that the first, second, fourth and eighth counts in the information allege that the respondent sold liquor without first procuring or having a license, while the third, sixth, and seventh counts allege that he did not have a license or first procure one, except at wholesale; and that by reason thereof the first set of counts are repugnant to and inconsistent with the last set. It is not necessary, however, for us to consider this question, for if such repugnancy exists it is no ground of demurrer. I Chit. Cr. L. 253-254; 1 Bish. Cr. Proc. §§453, 492; *Kane* v. *The People,* 8 Wend. 203.

The third count charges that the respondent "did, without first procuring a license to sell intoxicating liquor, except at wholesale, sell one pint and no more of whiskey to John

Docherty, the said John Docherty not having obtained a license to sell intoxicating liquor in the city of Barre, or in any town or city in the State of Vermont; contrary," etc. The fifth special cause of demurrer assigned to this count is "That said third count shows that the respondent first procured a license to sell intoxicating liquor at wholesale, but does not show that said sale as alleged was not a sale at wholesale under a license to sell by wholesale."

Can a person holding a license to sell intoxicating liquors by wholesale only lawfully sell a pint of whiskey to a person having no license to sell intoxicating liquor in any town or city in this State? is the question here presented. In many states having license laws somewhat similar to the one under consideration, what shall constitute a sale by wholesale and what by retail are defined by statute. The statute in question has no such provision, and the intention of the Legislature in this regard must be ascertained from the provisions of the whole act and the object sought to be attained thereby. The purpose of the act is, as its first section in effect declares, to regulate the sale of intoxicating liquors. In so doing it provides,—with the exceptions before noticed, which will be discussed presently,—that no person shall furnish or sell or expose or keep for sale any intoxicating liquor except as thereby authorized by license granted under and according to the provisions of the act; and other than the exceptions any person who furnishes, sells, or exposes or keeps for sale such liquors without first procuring a license, or a licensee who furnishes or sells, or a person who exposes for sale such liquors after his license has been forfeited, or during a suspension of its operation, is subjected to a penalty. § 68. By § 23 a classification of licenses is made. By § 24 licenses are subject to the condition "that no intoxicating liquor shall be sold otherwise than is provided in the classification."

It will be observed that, under the first class, a licensee is limited to the sale of intoxicating liquors to be drunk on the premises; under the second class, he is limited to such as are not to be drunk on the premises; under the third class, he is confined to the sale of malt liquors, cider, and light wines containing not more than fifteen per cent. of alcohol at 60 degrees Fahrenheit, to be drunk on the premises; under the fourth class, he may sell intoxicating liquors by the wholesale only. The fifth class licenses are issued only to retail druggists and apothecaries who are registered pharmacists, to sell for medicinal purposes and only on the written prescription of a legally qualified physician. The sixth class licenses are issued exclusively to summer hotels and the sales are confined to guests resorting thereto for lodging or food. The seventh class licenses are issued only for the sale of malt liquors, cider, and light wines, containing not more than fifteen per cent. of alcohol at 60 degrees Fahrenheit, not to be drunk on the premises. So far as the statute is not specific in the making of this classification, it must be construed to carry out the legislative intent and to make the classification consistent with itself. Exclusive of the fourth class, the privileges given under each class are dissimilar to those granted under any other class; and a careful examination of the law discloses no legitimate sale of any kind of "intoxicating liquors," as defined by section one of the act, that can be made to consumers for their own consumption, which is not within the provisions of some one of these classes of licenses. Further the sales to consumers may be of every character that can be made under licenses of those classes; while on the other hand sales to persons who buy to sell again do not appear to be within their intended scope. It cannot be claimed that sales of the character last named can be made under a license

of either the fifth or sixth class. Nor under a license of either the first or third class, for the liquor there sold is to be drunk on the premises. Nor under a license of either the second or seventh class, for the provision in each that the liquor sold is "not to be drunk on the premises," presupposes that the purchaser is the consumer. Otherwise there is no force in that provision. Applied to liquor sold to a person to sell again, such a limitation is absurd. It is not found in connection with a license of the fourth class. These facts are significant in showing the intention of the Legislature regarding the sense and scope to be given the clause providing for a license to sell by the wholesale.

The presumption is that the Legislature had a definite purpose in making the classification and has adopted and formulated the divisions and limitations in harmony with that intent, and that all classes of licenses which may be had under the law are necessary to accomplish it. The general rule is that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. Suth. Stat. Constr. § 240; *Catlin* v. *Hull*, 21 Vt. 152. Construed according to this rule it may well be said that a license to sell by wholesale, grants privileges not within the legal scope of the other classes. It follows that sales "by wholesale" within the meaning of this act are such only as may be made to persons holding a license to sell direct to consumers for the purpose of consumption, and the liquor must be sold to such licensees for that purpose; and that all other sales, that is, such as may be made under a license of any class other than the fourth, are sales "at retail." Under this construction of the law, the distinction between wholesale and retail depends not alone on the quantity sold, but also on the purpose of the sale and the character of the purchaser. A

similar distinction was made by the court of last resort in Tennessee, in *State* v. *Lowenhaught,* 11 Lea, 13, and in *Webb* v. *Baird,* 11 Lea, 667.

Not only is this construction in accordance with the manifest intention of the Legislature, but it is also in harmony with well established definitions of the terms "wholesale" and "retail." In 12 Ency. Eng. L. 587, it is said that "a sale by 'wholesale,' *prima facie,* means a sale by a merchant to a retailer." And in Stroud's Judicial Dictionary, 2327, referring to Bacon, V. C. in *Treacher* v. *Treacher,* W. N. (74) 4, it is said that "as a general rule 'wholesale' merchants deal only with persons who buy to sell again; whilst 'retail' merchants deal with consumers."

The allegations in the third count show that John Docherty, to whom the respondent is there charged with selling a pint of whiskey, did not have a license to sell intoxicating liquor in the city of Barre, nor in any town or city in this State. He was therefore not a licensed retail dealer, and the sale alleged to have been made to him by the respondent could not have been by wholesale. The third count in this respect is sufficient, as are also the sixth and seventh counts to which a similar objection is made.

The fourth, fifth, and sixth counts severally charge the selling of one pint of whiskey by "retail," etc. It is argued that these counts are insufficient because there is no such crime or offence under the law as unlawfully selling intoxicating liquor by retail. Manifestly, as already shown, the lawmakers had in mind the distinction between sales by wholesale and sales at retail and legislated accordingly. A licensee must be treated as knowing the law. The phrase "by the wholesale" specifies particularly the kind of sales that may be made under a license of the fourth class. When the holder

of such a license is charged with selling a pint of whiskey at retail he is given to understand with sufficient certainty that he is charged with selling a pint of whiskey to a consumer, a sale not authorized by his license. In charging such an offence, no precise technical words or expressions are required to be used. There is no rule that other words shall be employed than such as are in ordinary use, or that in criminal pleading, a different sense is to be put upon them than what they bear in ordinary acceptation. 1 Chit. Cr. L. 173. We think the allegation charges the respondent with a crime under the law, and that the three counts mentioned are sufficient in this respect.

In the demurrer to the third count the seventh cause assigned is that the allegations do not show that any proceedings were instituted by the board of commissioners against the respondent for violating the provisions of the act under which he was licensed; and the eighth cause assigned is that it does not appear that the commissioners have called the alleged offence to the attention of the state's attorney, and that therefore he has no jurisdiction to prosecute.

By §45, boards of license commissioners shall hold meetings not less than once in three months, when constables and other officers of the law shall report any indications they have observed, and information received tending to show violations of this act by a licensee or of sales or furnishing of intoxicating liquor by unlicensed persons. By § 46, such officers shall report forthwith to the board any such violation or unlicensed selling or furnishing they at any time observe or have brought to their attention. By § 47, any citizen may make complaint to the board at any time. By § 48, upon receipt of information or complaint as provided in the two preceding sections the board shall immediately investigate and

ascertain if the complaint is well grounded. If probable cause is found for proceeding against a licensee for a violation of any of the conditions of his license, or of the regulations prescribed in this act, the board shall issue a summons to him to appear and show cause why his license should not be revoked. Sections forty-nine to fifty-three inclusive relate to the hearing before the commissioners. By § 54, if on the hearing the board finds the charge established, and the offence of such gravity that the license is declared forfeited, the board shall thereupon bring the matter to the attention of a town grand juror or state's attorney who shall prosecute the offender before a court of competent jurisdiction. By § 55, if the offence is not such as to work a forfeiture of the license, but the nature of it is such as to call for some penalty, in the judgment of the board, it shall bring the matter to the attention of a town grand juror or state's attorney who shall institute prosecution if in his judgment the evidence is sufficient to warrant a conviction. And by § 57, if the information or complaint to the board be in regard to a violation of the law by an unlicensed person, the board shall institute prosecution for such violation; and for the purpose of the provision of this section each commissioner shall have the same power to make presentment as a town grand juror has.

It is contended that by the provisions of these sections the board of commissioners is made the exclusive tribunal for preliminary proceedings against licensed persons for all violations of the law, and that town grand jurors and state's attorneys can prosecute such persons for illegal furnishing and selling only on complaint of the board. We cannot adopt this view. It is very apparent that the primary purpose of the proceedings by the commissioners against a licensee, under the sections referred to, is upon the question of the forfeiture of

the license. Herein they have judicial powers, and if the license is declared forfeited an appeal may be had to the county court, § 56. Whether the proceedings result in a forfeiture of the license or not, no power is given to the board to prosecute the licensee for a penalty under the law. It can only bring the matter to the attention of a town grand juror or state's attorney. And then,—in case the license has not been forfeited—the town grand juror or state's attorney, to whom the complaint is made, is supposed to prosecute only when in his own judgment the evidence adduced is sufficient to warrant a conviction. Notwithstanding it is made the duty of constables and other officers to report to the board violations of the law by a licensee, and complaints may be made to it by other citizens, the law does not contemplate that such officers and other citizens shall not make complaints directly to a town grand juror or a state's attorney. The complaints may be so made, and when made they may be acted upon by the prosecuting officers the same as in the administration of other branches of the criminal law. That the intent of the Legislature was not to make the commissioners exclusively the prosecuting officers for instituting proceedings for offences calling for a penalty under the law is evident from the fact that by section 57, the only instance where they may so prosecute, they are given "the same power to make presentment as a town grand juror has." Thus distinctly recognizing the power of the latter. In *Commonwealth* v. *Murphy*, 147 Mass. 577, it was held that a statute providing that the "Mayor and aldermen of cities and the selectmen of towns shall prosecute to final judgment all violations" of a certain section of the liquor law, was intended to impose a duty upon the officers named; but that it was directory only, and did not exclude the right of any other citizen to enter complaints for a violation of the law.

But it is said that a person having a license in force is liable upon his bond for any wilful violations of any of the conditions or prohibitions of his license, and that therefore he cannot be prosecuted under section 68; that this must be so to avoid a double penalty for the same offence. An action on the bond is of a civil nature and does not take the place of nor prevent a prosecution by information or indictment for an act made criminal under the law. Practically the same question was before this Court in a case arising under the former liquor law, and the decision thereon is full authority for our holding here. By that law agents appointed and licensed by the county commissioners to sell intoxicating liquor for medicinal, chemical, and mechanical purposes might be required by the commissioners to give a bond running to the county, conditioned for the agents' selling of intoxicating liquor in conformity to the provisions of the law relating to the traffic in such liquor, and to such rules and regulations respecting the same as had been or might be prescribed by the commissioner, not inconsistent with that law. Gen. St. 592. In *State* v. *Parks,* before cited, the respondent pleaded particularly in addition to his license as agent, the giving of such a bond. Thereon the Court said "the fact that a bond is given does not seem to us any bar to the remedy by indictment. The remedies are by no means concurrent, nor can the bond be made to take the place of the public prosecution; certainly not when imprisonment is the penalty. If there is any liability to double prosecution for any violations of law by the agent, there is certainly no more danger of his suffering double punishment than in any case where there are concurrent remedies for the same cause of action, as in contract or tort."

The eighth count is said to be argumentative, nowhere directly averring that the respondent did not then and there

have a license to sell said intoxicating liquor or that a license had not been issued to the respondent authorizing him then and there to make the alleged sale of one pint of whiskey. This count contains three averments negativing a license. The first is "without any license then in force therefor." This in substance is like the negation in the fourth count, and needs to be noticed further only to say that the words "then in force" do not affect the force of the averment and are immaterial. Since this averment is sufficient, the other negations in the same count for the same purpose whether argumentative or otherwise, are mere surplusage.

This brings us to the consideration of the most important question in the case, namely, whether this act is repugnant to the 14th Amendment of the Constitution of the United States. The law provides, § 21, "No person shall furnish or sell or expose or keep for sale any intoxicating liquor except as authorized in this act; but the provisions of this act shall not apply to sales by the barrel by the manufacturers thereof of cider manufactured in this State or to sales by the barrel by farmers who raise apples sufficient to make the cider which they sell, if it is not drunk on the premises. Nor shall the provisions of this act apply to sales by the makers thereof of native wines manufactured in this State and not to be drunk on the premises of the maker."

The respondent insists that by reason of the provisions in this section, the law unjustly discriminates in favor of farmers, and of manufacturers of cider in this State, and of makers of native wines manufactured in the State, and that therefore it denies the equal protection of the laws guaranteed by that amendment. It is argued on behalf of the State that the respondent is charged only with selling whiskey, and that hence his rights are not affected by these provisions relat-

ing solely to the sale of cider and wine. By the first section of the act cider and all wines are classed as "intoxicating liquors." In the first count of the information the respondent is charged with selling "intoxicating liquor," without naming the kind. Under such an allegation, evidence tending to show an unlicensed sale of anything classed as "intoxicating liquors" would be admissible. *State* v. *Reynolds,* 47 Vt. 297; *State* v. *Waite,* 72 Vt. 108, 47 Atl. 397. It becomes necessary therefore to pass upon the constitutional question here raised in the determination of the case.

The act under consideration assumes to regulate the traffic in intoxicating liquors, and it prohibits sales by all persons except those who are licensed by the public authorities, and those who are exempt from the operations of the law. It comes within the ordinary police regulations which a state may make in respect to all classes of trade or employment for the comfort, safety, and welfare of society. *Bancroft* v. *Dumas,* 21 Vt. 456; *Lincoln* v. *Smith,* 27 Vt. 328; *State* v. *Hodgson,* 66 Vt. 134, 28 Atl. 1098. Under such laws classifications may be made. All that can be required is that they be general in their application to the class or locality to which they apply. But a statute is not free from unjust discrimination, if it selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. ed. 220. The classification attempted by section 21 creates four classes: (1) persons who cannot furnish nor sell nor expose nor keep for sale any "intoxicating liquors" without first procuring a license; (2) manufacturers thereof of cider manufactured in this State; (3) farmers who raise apples sufficient to make the cider which they sell; (4) the

makers thereof of native wines manufactured in this State. Persons within the second or the third class may sell their cider by the barrel if not drunk on the premises; and those within the fourth class may sell the product of their manufacture of native wines, not to be drunk on the premises of the maker, *ad libitum*. The mere fact of classification is not enough to relieve it of conflict with the equality clause of the 14th Amendment. The classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. Ed. 666; *State* v. *Hoyt,* 71 Vt. 59, 42 Atl. 973. In the exercise of the police power the regulations must have reference to the comfort, safety, or welfare of society. Cooley Const. Lim. (7th ed.) 837; *Thorpe* v. *Rutland & B. R. Co.,* 27 Vt. 140, 62 Am. Dec. 625; *Lawton* v. *Steele,* 152 U. S. 133, 38 L. ed. 385. So also the attempted classification in a statute thus limited as to the objects to which it is directed must rest upon some difference which bears a reasonable and just relation to some one of the same ends, for that is the act in respect to which the classification is proposed. In *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. ed. 679, the Court, through Mr. Justice HARLAN, said: "The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." In *Hayes* v. *Missouri,* 120 U. S. 68, 30 L. ed. 578, the Court, by Mr. Justice FIELD, said this amendment "does not prohibit legislation which is limited either in the

objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." In *State* v. *Harrington*, 68 Vt. 622, 35 Atl. 515, where the "itinerant vendors" act was upheld as a police regulation on the ground that it granted no exclusive privileges to any persons of the class to which the law applied, this Court said it was only when individuals of the class are singled out for exemption, that the inequality is manifest.

In the State of Ohio under the statute there known as the "Dow Law," an annual tax is assessed upon the business of every person trafficking in intoxicating liquors, and for each place where such business is carried on by him. The same statute provides that the phrase "trafficking in intoxicating liquors," as used in that act, "does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time." In *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 45 L. ed. 269, the orator, a corporation resident in and a citizen of the State of West Virginia and there the owner and operator of a brewery, sought to restrain the collection of such a tax assessed upon its business of trafficking in intoxicating liquor established in the city of Steubenville, in the State of Ohio. It was claimed by the orator that by the statute the domestic manufacturer may sell liquor in quantities of one gallon or more, at the place of manufacture, without being subjected to the tax, and that this operates as an illegal discrimination against the foreign competitor who must necessarily in that State sell at places other than the place of manufacture, and

is thereby subjected to the tax. It was held that there was no unjust discrimination, because the exemption was not confined to Ohio corporations or copartnerships, but extended as well to foreign corporations whose place of manufacture was within the State of Ohio; and that the tax was imposed on Ohio corporations which manufactured their goods in other states and established places for their sale in the State of Ohio, or which manufactured within the State, but established places there distinct from the manufactory where their goods were sold and delivered. It was further held that this law was enacted in the exercise of the police power, and that in distinguishing between places where the liquors are manufactured and those where liquors are sold to be drunk on the premises, the Legislature had in a measure drawn a line between the distillery and the brewery on the one hand and the saloon on the other, a distinction not unreal, and that by imposing the tax upon the latter, the law, to some extent, was calculated to lessen an acknowledged source of vice and disorder. See, also, *Adler* v. *Whitbeck,* 44 Ohio St. 539.

It cannot be said, however, that these cases arising upon the "Dow law" are determinative of the one before us; for that law does not undertake to prevent any one from engaging in the business specified. Nor does it apply to sales not made in the course of carrying on the traffic as a business. The word business implies an employment or occupation that is continuing,—*Parkhurst* v. *Brock,* 72 Vt. 355, 47 Atl. 1068,—and the tax is assessed upon a business which is being carried on. While, by the law now under consideration, all persons are prohibited from furnishing, selling, exposing or keeping for sale any intoxicating liquor except as authorized by that act; and except as specially otherwise provided in section 21, the procuring of a license is a condition precedent to the right

to make any sale or sales of such commodities. Hence the law furnishes no basis for a classification similar to that in the "Dow law," and no such classification is attempted by it.

In *Connolly* v. *Union Sewer Pipe Co.*, the validity of the "Illinois Trust Act," so called, of 1893, was involved. By that act, all trusts or combinations of capital, skill, or acts by two or more persons, firms, or corporations were prohibited. The breach of this law was, by the act itself, made a misdemeanor to be punished by a heavy fine. It was further provided therein that "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." It appears from the discussion of the case by the Court, that so far as the statute was concerned two or more agriculturalists or two or more live stock raisers might in respect to their products or live stock in hand, combine their capital, skill, or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing, or reducing their price; or do many other acts and things prohibited by the statute, without subjecting themselves to the fine imposed by the statute, while exactly the same things, if done by two or more other persons, firms, corporations, or associations of persons who shall have combined their capital, skill, or acts, in respect of their property, merchandise, or commodities held for sale or exchange, would be punishable by fine. It was held that persons engaged in trade or in the sale of merchandise and commodities within the limits of the State, and agriculturalists and raisers of live stock, were all in the same general class, alike engaged in domestic trade, which was, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the State might legally prescribe. The Court said: "In prescribing regulations for the conduct of

trade, it (the State) cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

In this respect the parallelism between the case just cited and the one before us is plainly manifest. Under the law in question, a manufacturer of cider in this State, may purchase apples without limit in quantity, make cider therefrom, and sell his manufactured product by the barrel at wholesale or by retail, if it is not drunk on the premises where sold. His right thus to sell is coextensive with the amount of his manufacture. Farmers who raise apples sufficient to make the cider which they sell, may sell it in the same way, if it is not drunk on the premises. A person may be a farmer and also a manufacturer of cider, in which event whether he raised the apples in whole, in part, or purchased them altogether, would make no difference; for so long as he sells by the barrel, if not drunk on the premises, he is without the pale of the law. Native wines may be made from grapes, currants, blackberries,

and from other fruits or berries which grow wild or by cultivation in this State. Yet the makers of such wines manufactured in this State may sell their product, if not to be drunk on the premises of the maker, in any manner and in any quantities they please. There is no limit under the law respecting the place or location where these commodities may be thus sold by such persons. Any one so exempt from the operation of the law may own or lease a building or part of a building in which to sell his cider or wine, contiguous to that occupied by a person holding a license of the fourth class authorizing him there to sell intoxicating liquors by the wholesale, or by a holder of a license of the seventh class authorizing him to sell, among other things, cider and light wines, not to be drunk on the premises, and in the building or part of building so owned or leased by the farmer or manufacturer, he may in person or by his agent sell his product, without license, under his immunity conferred by the law. Nor is this all, for he may sell them anywhere at his convenience, the public street not excepted. Can it be said that cider and native wines sold by the farmer or manufacturer are less harmful to the public than they are when sold by other persons? The injury to the public does not result from the difference between the individuals who sell, but from the natural injurious and evil consequences of the things sold. How then do farmers, and manufacturers of cider and of native wines in selling them, as they are permitted under the law, stand in any different class having a reasonable and just relation to either the comfort, or the safety, or the welfare of society from that of other persons or dealers who sell the same commodities in the same place and in the same way? In either case the article sold is "intoxicating liquor" by the terms of the statute; yet farmers and manufacturers may sell

without a license and with impunity, while all others who sell without authority by license are criminals and subject to a fine and in certain contingencies to imprisonment.

On questions arising under the Federal Constitution decisions of the Supreme Court of the United States are controlling upon this Court. The question under consideration is upon statutory provisions similar in principle to the provision in the Illinois statute involved in *Connolly* v. *Union Sewer Pipe Company*. That case is decisive of the one before us in this respect, and it must be held that the discriminations in favor of farmers and of manufacturers of cider and of native wines are unreasonable and unjust, and that by reason thereof the statute in question is a denial of the equal protection of the laws and unconstitutional. In the consideration of this question, we have not been unmindful of the cases of *Cronin* v. *Adams*, 192 U. S. 108, 48 L. ed. 365; *Lloyd* v. *Dallison*, 194 U. S. 445, 48 L. ed. 1062; *Missouri, etc. Ry. Co.*, v. *May*, 194 U. S. 267, 48 L. ed. 971; and *Field* v. *Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142.

To what extent is the statute unconstitutional? is the question which follows,—a question hardly less in importance than the preceding. Where a part of a statute is unconstitutional, that fact does not authorize courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose or otherwise so connected together in meaning, that it cannot be presumed the Legislature would have passed the one without the other. The valid and the invalid provisions may even be in the same section, and yet be so distinct and separable that the first may stand though the last fall. Whether they are contained in the same section is not the point, for the division into sections is purely artificial.

The question is whether they are essentially and inseparably connected in substance. If the unconstitutional portion can be stricken out and that which remains be complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. Cooley's Const. Lim. 7 ed. 247; *People* v. *Kenney*, 96 N. Y. 294.

The particular portion of the statute that is derogatory to the equality clause of the 14th amendment, permits farmers and manufacturers to sell cider by the barrel, and the makers of native wines in this State to sell their manufactured product, not to be drunk on the premises.

The majority of the Court are of the opinion that the unconstitutional provisions are severable from the rest of the act; and that the law will be quite complete and can be executed according to the intention of the law-makers without these limitations. But this cannot be done by treating as a nullity the provisions which exclude such sales from the operations of the act; for by so doing the exempted persons would be made amenable to the law and subject to its penalties the same as others, which would confer upon the statute a positive operation beyond the legislative intent. The unauthorized discriminations consist in not permitting all persons within the same class to sell cider and wine in the same way. So much of the act therefore as renders other persons liable for selling cider by the barrel not to be drunk on the premises, and for selling wine not to be drunk on the premises, is inoperative and void. In *State* v. *Marsh*, 97 N. C. 514, involving discriminations in a somewhat similar liquor law, the same conclusions were reached.

The pro forma judgment affirmed, and cause remanded.

WHITE RIVER SAVINGS BANK *v.* CAPITAL SAVINGS BANK AND TRUST CO.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed November 15, 1904.

Pledges—Bank Stock—Transfer—Rights of Partner—Remedies of Pledgee—Foreclosure—Liens—Demurrer in Answer—Bill in Equity—Necessary Party—Decree by Consent—V. S. 3689.

Although the charter of a corporation provides that its stock shall be transferred only upon the books of the corporation, and that no transfer shall be valid till the assignor shall have paid any debts due from him to the corporation, the corporation has no right to refuse to register a transfer of its stock when it had notice of the transfer before the assignor became indebted to it.

Under V. S. 3689, one to whom a certificate of shares of stock in a corporation is transferred as collateral security, by indorsement on the certificate with power of attorney, in blank, to make transfer on the books of the corporation, has the equitable interest and legal title of the assignor in the stock represented by the certificate, though, as against the corporation, *bona fide* purchasers, and creditors of the assignor unaffected with notice, the transaction is incomplete before transfer on the books of the corporation.

But, as record on the books of the corporation is required for notice merely, any one having actual notice of the transaction can stand in no better relation to it than he would if it were completed of record.

Though the legal title to corporate stock was transferred to a pledgee as collateral security, the latter took only a special property therein, the general property remaining in the pledgor; and the corporation is entitled to a lien thereon for money advanced to the pledgor after notice of the pledge, subject to the lien of the pledge.

Notice, given by a letter from the orator's treasurer to the defendant's treasurer, that the orator held certain stock in the defendant

corporation as collateral security, is notice sufficient to put the defendant on inquiry, and to charge it with such notice of orator's equitable interest in the stock as could have been obtained by inquiry.

When a demurrer, incorporated in an answer to a bill in equity, was heard and overruled and no appeal taken, and later a hearing was had on an agreed statement of facts and a decree entered, *pro forma*, dismissing the bill, from which decree an appeal was taken, the benefit of the demurrer was impliedly reserved to the defendant until the hearing, and the questions raised thereby are properly before the Supreme Court on the appeal from the final decree.

A pledgee of goods does not acquire an absolute title thereto by the failure of the pledgor to pay the debt within the time limited.

A pledgee, upon default of the pledgor, has no right of strict foreclosure, as in the case of a mortgage; but he may maintain a bill in equity, in the nature of a foreclosure, and thereon have a decree for judicial sale of the property, or he may sell the pledge without judicial process, on reasonable notice to the pledgor.

When no time of redemption is limited by a contract of pledge, the right to redeem extends through the pledgor's lifetime, and descends to his personal representatives, unless the pledgee in the meantime calls upon the pledgor to redeem.

When neither the time of redemption nor the manner and time of sale were specified in a contract pledging corporate stock as collateral security, and the corporation issuing the stock claims a prior lien thereon, the pledgee may maintain a bill in equity against the corporation for the enforcement of the pledge.

But when the stock so pledged is also subject to a second lien in favor of the corporation issuing it, the pledgee is not entitled to the relief specially prayed,—to have the stock transferred to it on the corporation's books, and a new certificate issued—but is entitled, under the prayer for general relief, to a decree for a judicial sale of the stock.

When a corporation has immediate notice from the pledgee that certain of its corporate stock is pledged as collateral security, the Statute of Limitations does not run in favor of the corporation, which had acquired a subsequent lien, as against the pledgee's right to enforce the pledge.

When defendant's lien on certain of its corporate stock attached within less than three years and seven months after it had received notice of the pledge thereof to the orator, and it is not

claimed that the orator, after notice of defendant's equities, has ever done anything to defendant's prejudice, the orator is not barred by laches from enforcing the pledge.

Though the pledgor of corporate stock is a necessary party to a suit in equity to enforce the pledge, yet, when the pledgor files the written consent of the pledgee that the stock may be sold under judicial decree, and the proceeds applied first to the payment of orator's debt and interest, and the remainder on a debt to the corporation, which had a lien therefor, the necessity of making the pledgor a party is obviated.

APPEAL IN CHANCERY, Windsor County. Heard at Chambers, April 21, 1904, on an agreed statement of facts. Decree, *pro forma,* dismissing the bill, Rowell, Chancellor. The orator appealed.

The demurrer to the bill was heard at Chambers Feb. 11, 1904, *Munson,* Chancellor. Demurrer overruled; no appeal. The opinion fully states the facts.

Hunton & Stickney for the orators.

The assignment to the orator indorsed on the certificate is good in equity, and transferred the owner's interest to the defendant. 1 Cook Corp. Ch. 31, §532; *Sargent* v. *Essex, Etc. Co.,* 9 Pick. 202.

A mere notice to the bank is all that is required to protect the transferee. 1 Cook Corp. § 532; 2 Thomp. Corp. § 2339.

T. J. Deavitt, and *Edward H. Deavitt* for the defendant.

A corporation's statutory lien on its stock attaches in favor of all debts due from the pledgor at the time transfer is requested. Thomp. Corp. § 2388; *Reese* v. *Bank,* 14 Am. Dec. 536.

Orator did not inform defendant that an assignment had been made, but only that it "holds as collateral security."

Farmers & Mechanics Bank v. *Hathaway*, 36 Vt. 539; *Russell* v. *Splater*, 47 Vt. 273; *Prout* v. *Vaughn*, 52 Vt. 451.

WATSON, J. The defendant is a corporation organized and doing business under a special charter, No. 99, Acts of 1890. The par value of its capital stock is one hundred dollars per share. The intrinsic value does not appear. Before and on August 22, 1895, one Charles P. Tarbell held certificate No. 75 issued to him for ten shares of this stock for which he had fully paid. On the day last named, the orator was the holder and owner of an overdue promissory note signed by Tarbell and others, by which they severally, each as principal, promised to pay to the order of the orator $2,500 on demand with interest semi-annually; and as collateral security for the payment of this note, Tarbell, on the same day transferred to the orator the said ten shares of stock by an indorsement on the certificate, which indorsement also contained in blank a power of attorney to make a transfer upon the company's books. At the time of this transfer, the orator notified the defendant by letter that the orator held the said certificate of stock as collateral security to a loan made by it. Tarbell was not then indebted nor under any liability to the defendant, but subsequently, on March 10, 1899, he executed and delivered to the defendant his promissory note for six hundred dollars for money then advanced to him by the defendant, payable on demand with interest semi-annually. This note has hitherto been owned by the defendant and is now with some interest thereon unpaid. Defendant holds some collateral security for the payment of the note but it is of little or no value.

The orator's note was reduced to a judgment at the June Term, 1902. Upon that judgment a small payment has been made by one of the other signers of the note, and other col-

lateral security held by the orator has been applied, leaving a balance of more than a thousand dollars still unpaid.

The certificate of stock with transfer thereon was never presented by the orator to the defendant for transfer on its books until December 30, 1902. Prior to that time, the dividends on the stock had been paid to Tarbell without any knowledge of the orator or objection by it.

On December 30, 1902, the orator presented the certificate with transfer thereon to the defendant and requested it to transfer said stock upon its books to the orator and to issue to the orator a certificate therefor. The defendant refused to comply with this request for the alleged reason that such transfer could not be made until the debt due from Tarbell to the defendant was paid, claiming a lien on the stock under section seven of its charter, which reads: "The shares of such corporation shall be transferred only in such manner and under such regulations as shall be prescribed by the by-laws thereof; provided, no transfer shall be valid until recorded by the cashier or treasurer, or in his absence by one of the trustees, in a book for that purpose, nor until the person making the same shall have previously discharged all debts and liabilities due from him to said corporation."

Nothing in this section gives the corporation any right to refuse to transfer stock on the records before the owner thereof becomes indebted or liable to it. Until then, the owner may sell his shares of stock, or transfer them as security in any way he chooses, provided he makes such delivery as the law requires. The statute provides that a transfer, by assignment and delivery, of a certificate of stock as collateral security, is a valid transfer of the shares of stock represented by the certificate, when made to secure a valid debt or obligation, as against the party so transferring the

same, his heirs, executors, administrators, and assigns. V. S. 3689. The orator holds the certificate of stock as security by such a transfer, with power to make a transfer upon the books of the corporation. Under the holdings of this Court, this gives the orator the equitable interest and legal right of the assignor in the stock represented by the certificate, although as against the corporation, *bona fide* purchasers, and creditors of the assignor, unaffected with notice, the transaction is incomplete. Yet as a record on the books of the company is required, not as an essential to pass title between the parties, but merely for notice, anyone having actual notice of the transaction can stand in no better relation to it than one would, had it been completed of record. *Cheever* v. *Meyer,* 52 Vt. 66; *Sabin* v. *Bank of Woodstock,* 21 Vt. 353; *Noyes* v. *Spaulding,* 27 Vt. 420.

Consequently when the defendant received notice from the orator that it held the certificate of stock in question as collateral security, the defendant was bound to respect the rights of the orator as pledgee of the stock. *People's Bank* v. *Exchange Bank,* 116 Ga. 820, 94 Am. St. Rep. 144; *Bank of America* v. *McNeil,* 10 Bush. 54; *Nesmith* v. *Washington Bank,* 6 Pick. 324; *Bradford Banking Co.* v. *Briggs,* 12 App. Cas. 29. By the pledge, however, the orator took only a special property; the general property remained in the pledgor. *Sampson* v. *Rouse,* 72 Vt. 422, 48 Atl. 666. Nor in this respect does the fact that as between the parties to the pledge, the legal title to the stock was transferred to the pledgee make any difference; for such transfer was in law equivalent to the delivery of possession in case of a pledge of corporeal property. *Wilson* v. *Little,* 2 N. Y. 443, 51 Am. Dec. 307; *Rice* v. *Gilbert,* 173 Ill. 348; *Brewster* v. *Hartley,* 37 Cal. 15, 99 Am. Dec. 237. Hence for any credit extended

to the pledgor after notice of the pledge, the defendant can have a charter lien on only the pledgor's general interest in the property subject to the lien of the pledge which it, as well as the pledgor, is entitled to redeem.

It is argued, however, that the notice received by the defendant is not sufficient to supply the requisites of a valid transfer prescribed by the act of incorporation. The treasurer of the orator sent by mail a letter to the defendant notifying it that the orator held as collateral security to a loan made , by it, certificate of stock No. 75 for ten shares of the capital stock in the defendant company, issued to Charles P. Tarbell. This letter was received by the treasurer of the defendant company. In the giving of this notice on the one hand and in receiving it on the other, the respective treasurers were in the performance of their official duties. In legal effect the notice was from the orator to the defendant. If the notice in itself was not sufficiently full, the defendant was certainly thereby put upon inquiry, and it is chargeable with knowledge of the orator's equitable interest, for by proper inquiry the defendant would have ascertained it.

In its answer, the defendant demurred to the bill for want of equity, and a hearing was had thereon. The demurrer was overruled, whereupon a hearing was had upon an agreed statement of facts and a decree rendered *pro forma* dismissing the bill. The case is here on the orator's appeal. The defendant now seeks to take advantage of the questions raised by the demurrer. It is urged by the orator that, as no appeal was taken to the decree overruling the demurrer, no question raised by it is before this Court. But under our present practice, we think the benefit of the demurrer was impliedly reserved to the defendant until the hearing, and that questions raised thereby are properly here. *Town of Westminster* v. *Willard,* 65 Vt. 266, 26 Atl. 952.

With the defendant's contention upon the demurrer, however, that the case presented is not properly cognizable in a court of equity, we cannot agree. The law is well settled that in addition to proceeding personally against the pledgor for his debt without selling his pledge, the pledgee has his election of two remedies upon the pledge itself. That he may file a bill in chancery in the nature of a foreclosure bill and proceed to a judicial sale, or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended sale. *Taggart* v. *Packard,* 39 Vt. 628; Bish. Eq. § 359; 2 Kent's Com. 11th Ed. star page 582; 2 Story's Eq. Jur. § 1033; 3 Pomroy's Eq. Jur. § 1412; *Carter* v. *Wake,* 4 L. R. Ch. D. 605; *Vanpill* v. *Woodward,* 2 Sandf. Ch. 143. And proceedings in equity are peculiarly appropriate, where, as in this case, neither the time of redemption nor the manner and time of sale are specified in the contract and the pledgee's rights or powers are being questioned or denied by the corporation which issued the stock pledged, itself claiming a priority of lien thereon. In a court of equity, the pledgee's trust can be made available with proper regard for the rights of all concerned. *Boynton* v. *Payrow,* 67 Me. 587.

The bill prays that the defendant be directed to make a transfer of the stock in question on its books to the orator upon the surrender of said certificate No. 75; and to issue a new certificate therefor to the orator. It also contains a prayer of general relief. But the particular relief thus prayed for should not be granted; for the stock so transferred with a new certificate therefor might by sale or pledge come into the hands of a holder for value without notice of any intervening equity, and thereby the defendant's lien be jeopardized if not defeated altogether.

Under the general prayer, however, the orator may have that relief to which, in the circumstances of the case, it is entitled.

A pledgee of goods does not acquire an absolute title thereto by failure of the pledgor to pay the debt or redeem the property at the time limited. His only interest is a special property to retain the goods for his security. Unlike the case of a mortgage, there is no forfeiture, but the pledgee may enforce his security and cut off the pledgor's right of redemption by a lawful sale of the pledge, and whenever the purpose of the pledge is satisfied, the right to the surplus, if any, is in the pledgor or some one having an interest in the general property under him. As before indicated, the pledgor retains the general title, and if no time of redemption is limited by the contract, the legal right to redeem is with him during his life time unless the creditor, in the meantime, calls upon him to redeem, and if he die without such call, the right descends to his personal representatives. 2 Kent's Com. 582; *Gifford* v. *Ford,* 5 Vt. 532. It follows that the orator has no right of strict foreclosure, as in the case of a mortgage, for this would work a forfeiture where none was intended by the contract and consequently where none could result at law. See *Carter* v. *Wake,* before cited. The pledge should be foreclosed and sold by the orator under judicial decree, that the avails thereof may be applied according to the rights of the parties as herein determined.

The defendant claims the benefit of the Statute of Limitations by its answer, and urges the same in argument. Since the corporation was affected by the contract of pledge after notice equally as much as if the transfer of the stock had been made upon its books, there is no color for the statute's being a bar to the enforcement of such transfer as may be necessary in the execution of the trust.

It is further urged that if the orator has equitable rights which accrued prior to the lien of the defendant, the orator has slept upon them for seven years and they should not now be allowed priority over the defendant's lien. This lien, however, attached with the advancing of money to Tarbell within less than three years and seven months after the defendant received notice of the pledge to the orator. No claim is made that the orator was then guilty of such laches as deprive it of priority. Neither is any claim made that the orator, with notice of the defendant's equities, has ever done any act to the defendant's prejudice. The credit was given to Tarbell by the defendant with full knowledge of the orator's interests. In these circumstances, it would be inequitable to give the defendant greater rights than it took in the creation of its lien.

The unpaid dividends have accrued since the demand was made upon the defendant for a transfer of the stock. No question is made but that they stand as an incident to the stock, and are governed by the same principles.

Since Tarbell still holds an interest in the general property, ordinarily he should be made a party to this suit. But here the orator has filed in this Court the written consent of Tarbell that the stock may be sold by the orator under judicial decree in this case and that the proceeds of such sale may be applied, first, to the payment of the orator's said debt secured by the pledge, and interest thereon, together with the expenses of the sale; and, second, that the balance of the proceeds of such sale, if any there be after the payment of the orator's debt, interest, and expenses as aforesaid, be paid to the defendant to be applied on its said note against Tarbell. Thereby the necessity of making Tarbell a party to the suit has been obviated and the case can proceed to final decree.

The pro forma decree reversed and cause remanded with mandate.

J. J. MONAHAN *v.* E. T. MONAHAN.

October Term, 1903.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed November 25, 1904.

Trusts—Conveyances to Avoid Taxation—Recovery of Property—Husband and Wife—Separate Property.

The fact that a wife assisted her husband in his business and in caring for the money which was the product of their joint labor does not make any part of the money thus accumulated her property.

Money earned by the wife during coverture belongs to the husband, in the absence of any agreement that it was to be hers.

When a wife has been assisting her husband in his business and in caring for the money which is the product of their joint labor, the fact that she, with the consent of her husband, deposits part of that money in a bank, does not make it her property, when this is consistent with the manner in which the husband and wife did business, and with her care of the money so earned.

The *prima facie* inference of a gift arising from the deposit of the husband's money in the wife's name, with his consent, may be rebutted by parol evidence, and a resulting trust established in favor of the husband.

While courts of equity give full effect, as between the parties, to gifts by husband to wife, they require clear and incontrovertible evidence to establish such gifts.

The test whether a demand connected with an illegal transaction can be enforced in equity is whether the orator requires the aid of the illegal transaction to establish his case. When the orator is not

required to disclose his fraud in making out his case, he can have relief, if entitled to it upon the grounds alleged and proved.

When a bill in equity, seeking to impress certain securities with a trust, alleges that the title was taken in defendant's name without his knowledge; that he held them in trust for the orator, and that he secretly took them into his possession, and refused to surrender them, and the issue made by the pleadings is in respect of the title to the property, without reference to any fraudulent conveyance, the orator cannot be denied relief because his evidence revealed a fraudulent purpose to avoid taxation by placing the securities in the defendant's name.

APPEAL IN CHANCERY. Heard on the report of a master at the September Term, 1902, Chittenden County, *Start*, Chancellor. Decree, *pro forma* for the orator. The defendant appealed.

W. L. Burnap and *R. E. Brown*, for the orator.

A wife is not entitled to her separate earnings, as against her husband. This is especially true, if she mingles them with the funds of her husband. Schouler on H. & W., § 294; *McCluskey* v. *Provident Institution*, 103 Mass. 300; *Kelley* v. *Drew*, 12 Allen 107.

In the absence of an agreement to that effect, none of the money could become the property of the wife. *In re Brown's Est.*, 65 Vt. 331; *Keniston* v. *Keniston*, 56 Vt. 680; 2 Story's Equity, § § 1375-1381.

Parol evidence may rebut the *prima facie* presumption of a gift from husband to wife, and establish a trust. *Wallace* v. *Bowen*, 28 Vt. 638; *Walston* v. *Smith*, 67 Vt. 542; *Clark* v. *Clark*, 43 Vt. 685; *McClintock* v. *Loisseau*, 2 L. R. A. 816; *Corey* v. *Morrill*, 71 Vt. 51.

To vitiate a trust because of a fraudulent or illegal transaction, the finding of fraud or illegality must be distinct

and unequivocal. *Pittman* v. *Pittman,* 11 L. R. A. 456; *McClintock* v. *Loisseau,* 2 L. R. A. 816.

H. S. Peck and *C. T. Barney* for the defendant.

It is well settled that when the wife, with the consent and approval of the husband, assumes the sole use and control of any of his property, and treats it as her own, this makes such property hers. *Delano* v. *Blanchard,* 52 Vt. 578; *Montpelier, Etc., R. Co.* v. *Langdon,* 45 Vt. 137; *Richardson* v. *Est. Merrill,* 32 Vt. 27; *Childs* v. *Pearl,* 43 Vt. 224; *Bent* v. *Bent,* 44 Vt. 555.

The title to the securities in question was taken in defendant's name for the fraudulent and illegal purpose of avoiding taxation. Equity will not relieve a party from the result of his own fraud. 14 Am. & Eng. Enc. Law (2 Ed.) 275 and 278; *Carpenter* v. *McLane,* 39 Vt. 9; *Robert's Admr.* v. *Lund,* 45 Vt. 82; *Woodward* v. *Wyman,* 53 Vt. 645; *Bank* v. *Brainerd,* 65 Vt. 291.

TYLER, J. The following are the material facts found by the master: The orator resided and practiced law in Underhill about thirty years; he was town clerk twenty-four years, postmaster eleven years, and made from all these sources an annual income of $1,200 to $1,500. He and his wife were poor when they moved to that town, but by industry and economy accumulated several thousand dollars prior to her death in 1900. Their son, the defendant, was born in 1873, and is now a lawyer in Boston, Massachusetts. Mrs. Monahan was a capable woman and assisted her husband in his profession and his public offices. She had the care of the funds of the two offices, also of her own earnings, and to some extent the earnings of her husband, though without any express agreement between them. She kept these

funds, and sometimes moneys collected by her husband, in a bureau drawer, which seems to have been the only place in the house for keeping money and valuable papers. Mr. and Mrs. Monahan and the defendant each had a key and access to the drawer, but by an understanding between the husband and wife the latter had the general care and custody of the drawer and its contents but not to the exclusion of the husband. No books of accounts nor memoranda were kept to show the amount of money placed in the drawer, nor does it appear how much each contributed to the amount thus accumulated. In 1889 and 1891 Mrs. Monahan earned $94, as superintendent of schools and as a member of the board of education.

In March, 1892, Mrs. Monahan began to make deposits in her name in a savings bank and continued to make them until her death. They varied in amounts from small sums to $650.

In 1896 one Batchelder applied to the orator for a loan, and negotiations were had between Mr. and Mrs. Monahan and himself upon the subject. The loan was agreed upon, and the orator requested his wife to see that the papers were properly made, which she did, taking Batchelder's note and a chattel mortgage running to the defendant, who afterwards learned of the transaction, took the note and mortgage into his possession, accepted two renewals of them, finally collected the amount due, used some of the money for his mother's comfort in her sickness and deposited the remainder to his credit in a savings bank. The orator did not know that his son had taken the Batchelder papers until he was looking over the papers in the drawer in December, 1899.

In 1897 one Whipple applied to the orator for a loan and it was agreed by Mr. and Mrs. Monahan that it should

be made. The latter, at her husband's suggestion, temporarily borrowed $675 on her own note and turned out her savings bank book as collateral security for the loan; the money was handed to Whipple who gave mortgage notes for $800, which included a former loan of $125, and made the notes and a mortgage running to the defendant. A loan of $200 was made to Whipple the August following, making his entire debt $1,000. The orator and his wife took part in drafting the notes and the mortgage, which were placed in the drawer.

The orator was employed to foreclose a mortgage against one Agan, in 1897, but paid the debt himself and took new notes and a mortgage running to the defendant. The orator made or assisted in making all the papers relative to this transaction. The first of these notes and the first year's interest upon the others were paid to him, and he temporarily used the other Agan note as security for the payment of money that he had occasion to borrow. When he paid the borrowed money he returned the notes to the drawer. The defendant did not know of this transaction until some months after it was made, but later on without his father's knowledge he had one of the notes and the mortgage with him in Boston. In the fall of 1899, in default of payment, this mortgage was foreclosed, but the suit was settled by Agan's deeding the property to the defendant. The orator was several times solicited to sell this property, but he replied to applicants that it was his son's and he would have to convey it.

There was no agreement between the orator and his wife that she should have the salary received from the post-office, nor the fees for recording papers, nor for drawing legal documents, which service she often performed and received pay for.

The orator knew that his wife kept a bank account in her name and did not in any way interfere with her so doing. They and their son lived in entire harmony, and the parents were agreed in giving the son a good education in high schools, the University of Vermont, and the law school of Boston University.

The orator and the defendant never had any conversation between them respecting these securities until after Mrs. Monahan's death.

In January, 1899, when the defendant was at home on a vacation, he took from the bureau the Whipple and Batchelder notes and mortgages and one of the Agan notes and the mortgage and carried them to Boston, but after a time replaced them, with the exception of the Batchelder loan, in the drawer, where they remained until after his mother's death, when he again took them into his possession and has retained them ever since, though requested by the orator to return them. He had collected the Batchelder debt before his mother's death.

None of this money was earned by Mrs. Monahan in any business carried on by her upon her separate account; her husband never gave her any money to hold as her separate property, and it does not appear that he regarded any of the money that was from time to time placed in the bureau as hers; on the contrary, the money derived from the various sources was not kept separate but was mixed together, and none of it came from the defendant.

I. Upon the findings it must be held that all the money in controversy was the orator's. The fact that his wife assisted him in his business and in caring for the money which was the product of their joint labor did not make it her property. Even the $94 earned by her was the orator's in the

absence of an agreement between them that it should be hers. *Potter* v. *Potter*, 64 Vt., 298, 23 Atl. 856; *Re Estate of Brown*, 65 Vt. 331, 26 Atl. 638; *Re Hall's Estate*, 70 Vt. 458, 41 Atl. 508. The deposits of money in the savings bank by Mrs. Monahan in her name, in the circumstances stated by the master, did not change the ownership from her husband to herself. These deposits were consistent with the manner in which the husband and wife transacted business and with the care which she took of the money that they earned together.

Cases cited by the defendant, where the wife before and during coverture received property by gift or inheritance which was regarded by her husband as her separate estate, are not in point. While from such deposits the *prima facie* inference may be that a gift was intended by the husband to the wife, that inference may be rebutted and overcome by parol proof to the contrary, and a resulting trust arise in favor of the husband. *Wallace* v. *Bowens*, 28 Vt. 638; *Bent* v. *Bent*, 44 Vt. 555. This rule applies to the savings bank deposits made in the wife's name and to the fact of the mortgages and the Agan deed being taken in the name of the defendant. *Walston* v. *Smith*, 70 Vt. 19, 39 Atl. 252.

It was held in *Keniston* v. *Keniston*, 56 Vt. 680, that "while courts of equity give full effect as between the parties to gifts by husband to wife, they require clear and incontrovertible evidence to establish such gifts as a matter of intention and fact." In that case the Court remarked that the master had found neither a gift nor an intention to give. See *McClusky* v. *Provident Institution for Savings*, 103 Mass. 300.

II. The master finds that the orator thought he was being taxed too high in Underhill; that the taxation was

unjust, and that it was his intention not to be taxed upon these securities in that town. In the supplemental report it is stated that the orator's intention was a personal one with reference to his not being taxed thereon, and that he did not intend that the defendant should not return said loans wherever the same ought to be legally taxed, but we consider that this does not change the original finding.

The orator's testimony about the Whipple mortgage is reported as follows: "The listers, a year or two before that, had raised my list $400; it did not please me nor Mrs. Monahan; we rather thought it was unjust. Edward had just entered the Boston Law School, and I proposed that we take the mortgage in his name, setting him up as of Boston, Mass., that the listers would not attempt to place that mortgage in the list. It was done so." He further stated that he caused the Batchelder and Agan mortgages and the Agan deed to be made running to his son for the same purpose.

All of the property in controversy was taxable to the orator in Underhill, and it was his legal duty to place it in his inventory each year after the securities were respectively taken. This he did not do, but caused them to be made payable to the defendant, to prevent their being taxed to himself in that town. The defendant entered the Boston law school in October, 1896, but did not change his residence from Underhill to Boston until April, 1899.

The orator claims in his bill that his acts in taking these securities in the defendant's name created a resulting trust in the latter, and he prays the court to declare it a trust and by its decree terminate it and order that the property be returned to the orator.

The question is whether or not the case falls within the general rules in equity, that the court will not enforce a trust

springing out of the complainant's own fraud; that a party will not be relieved from the consequences of his own fraud; that one who has conveyed property to defraud his creditors has not such an equity as will entitle him or his heirs to relief. 14 Am. and Eng. Ency., 2nd Ed., 275, 278. *Peaslee* v. *Barney,* 1 D. Chip. 331, 6 Am. Dec. 743. In the latter case it was held that it was not competent for an administrator to impeach and set aside an act done by his intestate in his life time in conveying his property to defraud his creditors.

It appears that there was no agreement or understanding between the orator and the defendant that the securities should be taken in the name of the latter; that the orator did not deliver nor intend to deliver the securities to the defendant, and that the defendant took possession of them without the orator's consent or knowledge and refused to return them when requested; that if the defendant had not appropriated them to his use the orator could at any time have taken them from the drawer and held them as his own property.

The essential allegations in the bill are that the securities were taken in the defendant's name without his knowledge; that he held them in trust for the orator; that he surreptitiously took them into his possession and refused to surrender them. The prayer is that the securities may be declared to be held in trust by the defendant for the orator, and that the orator's rights thereto may be enforced. The answer in substance is that the moneys that went into the securities were not the orator's but were in part the defendant's though mainly his mother's, and that he acquired all his mother's interest by her will which had been duly proved. No claim of a fraudulent conveyance by the orator was made in the answer. The issue made in the pleadings was in respect to the title to the property. A majority of the judges are there-

fore of the opinion that the case falls within the well settled rule in equity, that where a party is not required to disclose his fraud in making out his case, he can have relief if entitled to it upon grounds alleged and proved. This rule was adopted by Lord Mansfield in *Hulman* v. *Johnson,* Cowp. 343, where he said:

"The objection that a contract is immoral or illegal as between the plaintiff and the defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake that the objection is ever allowed, but it is founded on the general principles of policy, which the defendant has the advantage of contrary to the real justice between himself and the plaintiff." In *Simpson* v. *Bloss,* 7 Taunt. 246, the Court also recognized the test whether a demand connected with an illegal act can be enforced is whether the plaintiff requires aid from the illegal transaction to establish his case. There the suit was brought to recover upon an illegal wager upon a horse race.

In *Swan* v. *Scott, 11 Sergeant & Rawle,* 155, the plaintiff obtained an award of arbitrators against the defendant, founded on an illegal lottery transaction, and afterwards, the defendant gave the plaintiff his bond in satisfaction of the award. In a suit brought upon the bond it was held that the defendant could not go beyond the award and show that the demand for which it was obtained originated in an illegal transaction. The Court said: "The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the Court will not assist him, whatever his claim in justice may be upon the defendant." This test

has been repeated in the following cases: *Thomas* v. *Brady*, 10 Barr, 170; *Scott* v. *Duffy*, 14 Pa. 20; *Evans* v. *Dravo*, 24 Pa. 65.

In *Gilliam, Exr.*, v. *Brown*, 43 Miss. 641, a question was considered respecting a contract for carrying cotton through the enemy's lines in time of war, which acts were in violation of the laws of the United States. In discussing the case the Court said: "It is well settled that after the illegal contract has been executed, one party in possession of all the gains and profits resulting from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law."

It is observed in the opinion in that case that there has been an increasing tendency in Courts to treat the new promise as unconnected with the original contract so as to escape from the unjust consequences of the application of the general rule, that if a contract grows out of an illegal act a court of justice will not enforce it. The following cases are cited: *Armstrong* v. *Toller*, 11 Wheat, 269; *Craig* v. *Missouri*, 4 Pet. 410; *Roby* v. *West*, 4 N. H. 290; *Patterson* v. *Nicholas*, 3 Wheat. 204; *Wooten* v. *Miller*, 7 S. & M. 385; *Wheeler* v. *Russell*, 17 Mass. 258; *Sheffner* v. *Gordon*, 12 East, 304; *Brooks* v. *Martin*, 2 Wall. 79; *McBlair* v. *Gibbs*, 17 How. 236; *Tennant* v. *Elliot*, 1 Bos. & Pul. 3; *Turner* v. *Russell*, 2 Bos. and Pul. 296.

In commenting upon these cases the Court said in conclusion: "Whilst affording this relief the Courts are not obnoxious to the imputation of giving effect to illegal contracts or encouraging immoral acts. In all these cases the violation of law has already been accomplished, and one party is found in possession of money which belongs to another, and no

detriment can arise further by raising an *assumpsit* to pay it over to the principal."

In *Phalen* v. *Clark,* 19 Conn. 421, the facts were as follows: The plaintiff being the assignee of a lottery granted by the State of Rhode Island and the proprietor of all the tickets in the lottery not sold at the time of drawing, entrusted the defendant, who was residing at Hartford, Conn., and then was and for a long time had been the agent of the plaintiff for the sale of tickets, with a large number of tickets to sell or return. At the time of the drawing of the lottery one of the tickets so held by the defendant drew a prize of $30,000. By a fraudulent combination with one Pinney the defendant obtained information of that fact in advance of the mail, and in his return of sales the plaintiff included such prize ticket as having been sold to Pinney before the drawing. The defendant and Pinney afterwards caused this ticket to be presented to the plaintiff for payment of the prize, representing Pinney as the *bona fide* owner thereof, and the plaintiff, being ignorant of the fraud, paid the prize. On a bill in chancery brought by the plaintiff against the defendant and Pinney to recover back the money so paid it was held that the agency of the defendant to sell terminated with the drawing of the lottery, and that he thereupon became a mere depositary; that the fraudulent combination between the defendant and Pinney and the consequent injury to the plaintiff were entirely independent of any act in which the plaintiff had participated, prohibited by the laws of Connecticut, and consequently that the plaintiff was not precluded from a recovery on the ground of his being *in pari delicto.*

In the opinion the Court remarked: "We suppose it to be a well settled doctrine, that, if a plaintiff requires any aid from an illegal transaction to establish his demand, he

cannot recover it; or in other words, if he is unable to support it without relying upon an unlawful agreement between himself and the defendant, he must fail. But if the parties have been engaged in business, either *malum in se*, or merely prohibited by law, yet if the cause of action be unconnected with the illegal act, and is founded upon a distinct and collateral consideration it will not be affected by their former unlawful conduct."

Feret v. *Hill*, 80 Eng. Com. Law, 207, is in point. There the plaintiff obtained of the defendant a lease of premises by means of a false representation that he intended to carry on a lawful trade therein. Having obtained possession, the plaintiff converted them to an illegal use, and the defendant forcibly expelled him. It was held that the plaintiff might maintain ejectment; that the fraudulent misrepresentation and the subsequent illegal use of the premises were not sufficient in law to avoid the lease. In the opinion it was said: "The plaintiff is not calling upon the Court to enforce any agreement at all. The agreement was an agreement on the part of the defendant to demise certain premises to the plaintiff for a given term. When the instrument was executed, and possession was given under it, it received its full effect: no aid of a court of justice was required to enforce it. This action of ejectment is brought, not for the purpose of enforcing the agreement, but the plaintiff asks the Court to afford him a remedy against one who has extruded him from a lawful possession. There is therefore a manifest distinction between this case and those where the Court was called upon to assist the plaintiff in enforcing an agreement, the object of which was to do an illegal act, as in *Ritchie* v. *Smith*. In that case both the plaintiff and defendant were parties to an agreement, the very object and intention of which was, to enable one of them to commit an infraction of the law."

In *Taylor* v. *Bowers,* 1 Queen's Bench 291, the plaintiff being in embarrassed circumstances, pursuant to an agreement with another person, delivered his entire stock in trade to that person and took back fictitious bills of exchange. An inventory of the goods was given, but no bill of sale was executed. The object of the transaction was to prevent the plaintiff's creditors from getting their pay in full. The defendant was a creditor of the plaintiff and was cognizant of the arrangement between him and the other person, who, some months later, executed a bill of sale of the goods to the defendant for the alleged purpose of securing his debt. But the plaintiff was not a party to the bill of sale, nor did he sanction or know of it. He afterwards demanded the goods and then brought suit. It was held that the fraudulent purpose not having been carried out, the plaintiff was not relying upon the illegal transaction, and was entitled to repudiate it and recover his goods; that the defendant got no title because he had knowledge of the original transaction. COCKBURN, C. J., in the opinion said: "The action is not founded upon the illegal agreement, nor brought to enforce it, but, on the contrary, the plaintiff has repudiated the agreement, and his action is founded on that repudiation." He cited several cases where money had been paid, and goods delivered, under an unlawful agreement, but there having been no further performance of it, it was held that the party paying the money or delivering the goods might repudiate the transaction and recover his money or goods. The judgment was affirmed in the Court of Appeals. *James,* L. J., remarked: "All the plaintiff has got to say is: 'These were my goods. I was possessed of them. I have never parted with them to anybody. They are my goods still. I never sold them, and I have never given them to anybody in such a way as to

deprive myself of the right to possession of them.' It is the defendant who has got really to show the fraud."

Taylor v. *Chester* appears in 6 Eng. Rul. Cas. 477, and the rule is formulated therefrom that: "Where money has been paid under an illegal contract the question whether it can be recovered back depends on whether the parties are *in pari delicto;* and the test is whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he himself was a party." Following that case is *Diggle* v. *Higgs,* from 46 L. J. Ex. 721-725, where it was held that: "The deposit of a sum of money by two persons in the hands of a third, to abide the event of an unlawful game between the two, is a wager, and not 'a subscription or contribution to a prize' within 8 & 9 Vict. c. 109, s. 18. Such a deposit may be recovered by the depositor from the stakeholder, if demanded, before it is paid over to the winner."

In the latter case the rule is stated that, "But where money has been paid to a stakeholder upon a wagering agreement which is void, but not illegal, by statute, it may be recovered back if demanded before it is paid over to the winner."

Elaborate notes follow these cases and in the English notes it is stated that the principle in *Taylor* v. *Chester* underlies those cases where property has been conveyed or given for an immoral consideration; and that if the illegal act has been substantially executed the consideration is irrevocable; but where the illegal act remains unexecuted, the consideration paid for it may be recovered. In the American notes to these cases it is said that in this country as in England, the law leaves parties to an executed illegal contract, when equally in fault, to their fate, and therefore will not sustain an action to recover money paid, or goods or lands delivered under

such a contract; and numerous cases are cited. In the same notes it is declared that the doctrine of *Diggle* v. *Higgs* is supported by a multitude of cases, and is the universal doctrine of the American Courts.

The doctrine in *Taylor* v. *Bowers* is approved in *Spring Co.* v. *Knowlton,* 103 U. S. 49, where it is held that a party to a contract, the making of which although prohibited by law, is not *malum in se,* may, while it remains executory, rescind it and recover money by him advanced thereon to the other party who had performed no part thereof. Upon this subject are cited 2 Comyn on Contracts 361; 2 Parsons, 746; 2 Addison, § 1412; Chitty, 944; 2 Story, § 617; 2 Greenl. Ev. § 111.

The cases above cited, and most of those to be found in the books bearing upon this subject, have arisen upon contracts, and the parties seeking relief were *in pari delicto* with the defendants in the illegal contracts. But here neither the issue made by the bill and answer nor the facts reported by the master present a case arising from contract. But the rule is as applicable to this case as it is to cases arising from contracts, for the orator could prove the essential facts in his case without disclosing his fraudulent purpose in having the notes, mortgages and deed made running to the defendant.

The pro forma decree is affirmed, and cause remanded.

TYLER, J., dissenting. I am not able to concur with the majority of the judges in some of the views above expressed.

It is true that the orator did not intend that the defendant should acquire title to the securities that were placed in his name; that there was no delivery of them, and that the defendant obtained possession of them wrongfully and against the will of the orator. Do these facts take the case out of the

general rules above stated, so that the orator can have a decree for a return of the property?

It is elementary that while a court of equity will endeavor to enforce justice in transactions between parties, it will act upon the rule that he who comes into a court of equity must come with clean hands. This is declared to be a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights. 1 Pom. Eq. Jur. § 398. It is indeed held, as Pomeroy says in the following section, that this broad principle must be taken with reasonable limitations; that it does not apply to every unconscientious act on the part of the plaintiff; that it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation and with which the opposite party has no concern; and quoting from § 399: "When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands." But in § 404, he says * * *; "any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."

Applying this rule to the case in hand, it cannot be held that the defendant's wrongful act was not connected with the orator's transactions in placing the securities in the defendant's name for the confessed purpose of escaping taxation upon them. On the contrary, the conversion of the property by the defendant to his own use was the result of the orator's fraudulent plan. All the steps taken by the orator must be considered,—the formation of the purpose to avoid taxation,

the taking of the securities in the defendant's name, stating his residence as Boston to mislead the listers, the orator's omission to place the securities in his sworn inventory, depositing them within the defendant's reach and the appropriation of them by the latter, constituted one transaction, the last act being the outcome of the former ones. The orator's wrongful acts enabled the defendant to appropriate the securities to his own use.

The opinion of the majority is not placed upon the ground that the defendant's act in appropriating the funds in question to his use was disconnected from the orator's acts, so as to bring the case within the rule in Pomeroy, but it rests upon another rule in equity stated in the opinion. In our judgment the orator is not entitled to the benefit of that rule, for though in his bill he only alleged that his property was in the hands of the defendant who refused to return it, and the answer alleged no fraud, yet the orator in order to prove his case before the master frankly stated his reasons for placing the property in the defendant's hands and thus disclosed his fraud. When the case came into this Court upon the master's report the orator's fraudulent purpose and acts at once appeared.

We are aware that it has been held in some cases that to disentitle the orator to the benefit of the rule, the fraud must be made an issue in the pleadings and established by proof, but such a holding cannot be sound in principle, for, applied to this case, it in effect says to the orator that though he admits that he placed the property in the defendant's name for the purpose of escaping his share of the burden of taxation and he thereby subjected himself to a heavy penalty under V. S. 414, he is entitled to relief because it was not necessary that the fraud should appear in order to make out his case.

As strict a rule should be adopted in this case as is held in suits that are brought to enforce contracts made in violation of statutes, or in cases where one party seeks to be relieved from an illegal contract and the doctrine of *in pari delicto* applies, and expressions of courts in such cases are pertinent.

In *Bank of U. S.* v. *Owens*, 2 Pet. 538, a suit to enforce an illegal contract, it is said in the opinion: "Courts are instituted to carry into effect the laws of the country; how can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

In *Hall* v. *Coppell*, 7 Wall. 542, a suit brought to enforce a contract void as against public policy: Justice SWAYNE, commenting on the instructions of the court below, that the illegality had been waived by the act of the defendant, says, "In such cases there can be no waiver. The defence is allowed not for the sake of the defendant but of the law itself." Again, "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." See also *Bank* v. *Lanier*, 11 Wall. 369. In *Hanauer* v. *Woodruff*, 15 Wall. 439, the Court said: "When a contract is thus connected by its consideration with an illegal transaction a court of justice will not aid its enforcement. It is sometimes said that

the test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. This test was given in *Simpson* v. *Bloss* by the Court of Common Pleas, in England. But it is too narrow in its terms and excludes many cases where the plaintiff might establish his case independently of the illegal transaction, and yet would find his demand tainted by that transaction. He might, in some instances, establish his case by showing a simple loan of money, or a simple sale of goods, yet the court would hold the contract of loan or sale to be invalid if at the time the money was loaned or the goods were sold he knew they were to be used for an illegal and criminal transaction, and the contract was made to further its execution." *Bartle* v. *Nutt, Admr. of Coleman,* 4 Pet. 184.

In *Roby* v. *West,* 4 N. H. 285, the Court used this language: "The principle, that no court shall aid men, who found their cause of action upon illegal acts, is not only a well settled, but a most salutary principle. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice."

In *Wheeler* v. *Russell,* 17 Mass. 258, the Court declared this rule: "Where the contract is declared void by statute, or is to do a thing directly prohibited under a penalty, or against the policy of the law generally, the case is plain. So where the consideration arises out of, or is indirectly connected with, the violation of some great principle of public policy, the contract is in many cases void. But where the consideration arises out of or is remotely connected with what is merely *malum prohibitum,* the contract is not necessarily void."

Taylor v. *Chester,* 4 Queen's Bench 307, has been cited: There the plaintiff sued to recover a bank note that he had

deposited with the defendant as a pledge to secure the payment of money due from him to the defendant. The sum due was for wine and suppers furnished to the plaintiff by the defendant in a brothel kept by the latter to be there consumed in a debauch. The declaration alleged only the bailment of the note; that it was to be redelivered on request, a request, and a refusal to return the note. The defendant pleaded that the note had been deposited to secure the payment of money advanced by and then due her. The plaintiff replied the purpose for which the note had been deposited. *Mellor,* J., in delivering the opinion of the Court said: "The maxim, *in pari delicto,* is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of the plaintiffs or defendants, but founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, for the courts will not assist an illegal transaction in any respect," citing Lord Ellenborough in *Edgar* v. *Fowler,* 3 East 222, and Lord Mansfield in *Holman* v. *Johnson,* Cowp., 343. The Court further said: "In order to get rid of the defence arising from the plea which set up an existing pledge of the note, the plaintiff had recourse to the special replication in which he was obliged to set forth the immoral and illegal character of the contract upon which the note had been deposited. It was therefore impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party."

The case last cited is a strong authority in support of our contention. It is true that the plaintiff's fraud appeared in the pleadings; but in most cases, and in all cases tried upon the general issue, the plaintiff's fraud would not appear until he

put in his testimony. Can it then be maintained that the plaintiff's fraud thus coming to the knowledge of the court will not defeat his right of recovery?

The disfavor with which courts regard suits founded upon claims tainted with fraud and upon schemes to avoid taxation is illustrated in *Mitchell* v. *Board of Commissioners,* Leavenworth, Kan., 91 U. S. 206. There the facts were that personal property including money on deposit, was listed for taxation as of March 1 each year. The plaintiff in error had a large balance of money to his credit in a bank, and on the 28th day of February gave his check therefor payable to himself in United States notes that were exempt from taxation. They were paid to him and he enclosed them in a sealed package and placed them for safe keeping in the vault of the bank. March 3rd he withdrew the package and deposited the notes to his credit. This was done for the sole purpose of escaping taxation upon his money. The taxing officers however, on discovery of the facts, assessed the money in the bank and the plaintiff filed a bill in equity to restrain the collection of the tax, alleging that the money had been converted into United States notes before the day on which it was to be listed. The Supreme Court of the State dismissed the bill on the ground that, "a court of justice, sitting as a court of equity, will not lend its aid for the accomplishment of any such purpose." The Supreme Court of the United States affirmed the decree and held that "a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation."

This case must be governed by the rule that governs suits brought to obtain a reconveyance of property conveyed to defraud creditors. In such cases, "The door of the court of

equity is shut against such a claimant." Notes to 1 Pom. Eq. 401; *Moore* v. *Jordan,* 46 Am. Dec. 641; *Dent.* v. *Furguson,* 132 U. S. 50; *Hildebrand* v. *Willig,* N. J. Eq., 53 Atl. R. 1035; 14 Am. & Eng. Ency., 275; *Roberts, Admr.* v. *Lund,* 45 Vt. 82.

We think that upon the facts found by the master, by reason of the orator's fraudulent acts he is not entitled to the relief prayed for. The holding of the Court in *Ransom* v. *Burlington,* 111 Ia. 77, is applicable here: "While one may lawfully dispose of his property to escape taxation, * * * the law will not uphold any mere manipulation, under the guise of disposition, the only effect of which is to defeat a tax." *Shotwell* v. *Moore,* 129 U. S. 590.

We think the bill should have been dismissed.

Start and *Stafford,* JJ., concur in the dissenting opinion.

J. J. MONAHAN *v.* E. T. MONAHAN.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed November 15, 1904.

Supreme Court—Jurisdiction—Motion after Mandate.

A mandate sent down by the Supreme Court, upon final judgment in a case appealed from the court of chancery, carries the case with it, and puts it into the court of chancery to be proceeded with according to law and the practice of that court.

After such mandate, the Supreme Court has no jurisdiction to entertain a motion that the case be brought forward from its docket, and continued.

MOTION that a case be brought forward from the docket and continued, made and heard in Supreme Court, October Term, 1904. The opinion states the facts. See the original case, *Monahan* v. *Monahan, ante.*

ROWELL, C. J. This is a motion that the case be brought forward from the docket of last term, the entry then made therein affirming the decree and remanding the case, stricken off, and the case continued, because, no opinion having yet been filed, the defendant's solicitors are ignorant of the grounds of the judgment of this Court, and so do not know what, if any action should be taken to protect the defendant's rights. But this motion cannot be granted, for the case is not here. The mandate was sent down on the 30th of last May, and the case then entered on the docket of the Court of Chancery. That this was after the final adjournment of the March term of Chittenden county court makes no difference, for when the mandate went down it carried the case with it, and put it into the Court of Chancery, to be proceeded with according to law and the practice of the court, for such is the force of the statute, which provides that the case shall be remanded, and when remanded, that it shall be entered on the docket of the Court of Chancery, and if that court is then in session, that the same proceedings may be had therein as though the case had been entered the first day of the term, and a final decree entered as in other cases. V. S. 986. This last provision has been enlarged by V. S. 915 as amended by Sec. 6, No. 35, Acts of 1898, which provided that for all purposes the Court of Chancery shall always be open for business, and that a chancellor at chambers may make any order or decree that the court can make at a stated term.

That the effect of the mandate is, when it goes down, to take the case out of this Court, has been regarded as a thing

of course. Thus, in *Comerdy* v. *Baker,* 55 Vt., at page 581, it is said that probably this Court would hear a motion to correct apparent errors, if made at the term and before the case is remanded. In *Lamoille Valley R. R. Co.* v. *Bixby,* 57 Vt., at page 561, it is said to be too late to apply after mandate. The same thing is true when a case is remanded by this Court to the county court. *Underhill* v. *Jericho,* 66 Vt. 183, 28 Atl. 879, and also when a case is appealed from the judgment of a justice. *Banister* v. *Wakeman,* 64 Vt. 203, 23 Atl. 585.

Motion denied with costs.

C. F. BAILEY *v.* PRUCIUS W. MANLEY.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 15, 1904.

Auction—Representation by Auctioneer—Sales—Recision—Tender—Waiver.

When an auctioneer, during a public sale conducted by him, announced that everything should be as represented or no sale, and no specific article was exempted therefrom, that statement applied to a mare sold at the auction, represented by the owner to be sound.

In order to rescind a contract of sale the buyer need not make a manual tender of the property sold, when the seller expressly refuses to take it back.

ASSUMPSIT for the price of a horse. Plea, the general issue. Heard on report of a referee at the June Term, 1904,

Windsor County, *Start,* J., presiding. Judgment for the plaintiff. The defendant excepted. The opinion states the case.

Fred H. Spaulding for the plaintiff.

The defendant's notice "that the mare was at his place in Dummerston, and subject to his order," was not a sufficient tender. *Warner* v. *Wheeler,* 1 D. Chip. 159; *Gates* v. *Bliss,* 43 Vt. 299; *Gilman* v. *Bingham,* 43 Vt. 410; *Waters Heater Co.* v. *Mansfield & Stimson,* 48 Vt. 378; *Boughton* v. *Standish,* 48 Vt. 594.

F. D. E. Stowe for the defendant.

Taking the mare home did not constitute an absolute acceptance. Benj. Sales, (4 Am. Ed.) §911.

WATSON, J. It is found that at the time of the sale of the mare at auction the plaintiff represented her as sound and all right, and the defendant then understood that she was so represented. During the auction and before the sale of the mare the auctioneer several times announcd that "everything should be as represented or no sale." These statements were not made with reference to any specific article, nor was any specific article excepted therefrom. They therefore had the same application to the mare as they did to other property. It is also found that the mare was sometimes lame, caused by "a strain of the main muscles of the left shoulder, which is an unsoundness and considered incurable;" that after the defendant had purchased the mare and on the same day, he rode in a buggy to his home in Dummerston, a distance of nine miles, leading her behind. That day he did not notice that she was lame, but the next morning "she was stiff in

front and quite lame from what appeared to be a chronic difficulty." Thereupon the defendant found the plaintiff in Putney, told him the condition the mare was in, and notified him that she was at the defendant's place in Dummerston and subject to the plaintiff's order; that she was not such a horse as he wanted, and that he would not pay for her. The plaintiff replied that he should not take the mare back, and that the defendant must pay for her. This was the only offer or demand made by either party before this suit was brought. No question is made but that the defendant had a right to rescind the contract, nor but that he acted seasonably in attempting so to do. The claim is that what the defendant did, did not amount to a rescision, for the reason that his notice that the mare was at his place in Dummerston and subject to the plaintiff's order was not such a return or offer of return of the mare as constitutes a tender of her back tc the plaintiff. But when the plaintiff refused to take the property back, a tender was not necessary to make the recision complete. *Barrett* v. *Tyler and Chadwick*, 76 Vt. 108, 56 Atl. 534.

Judgment reversed, and judgment for the defendant to recover his costs.

L. H. McDaniels *v.* L. P. DeGroot & Trustee.

October Term, 1904.

Present: Rowell, C. J., Tyler, Start, Watson, Haselton, and Powers, JJ.

Opinion filed November 15, 1904.

Officer's Return—Falsification—Plea in Abatement.

An officer's return cannot be falsified by a plea in abatement.

General Assumpsit. Heard on general demurrer to a plea in abatement, at the March Term, 1904, Chittenden County, *Munson,* J., presiding. Demurrer sustained. The defendant excepted.

The scope of the plea in abatement is stated in the opinion.

H. S. Peck for the defendant.

Powell & Powell for the plaintiff.

Rowell, C. J. The plea in abatement, which is demurred to, does not challenge the sufficiency of the service of the writ on the defendant as shown by the officer's return, but only denies the truth of the return, and alleges that no such service was made as is thereby shown, and that no other service was made on the defendant by that officer nor any other.

The officer's return cannot be falsified by a plea in abatement. *Columbian Granite Co.* v. *Townsend,* 74 Vt. 183, 52 Atl. 432.

Affirmed and remanded.

FRANK E. FARMER *v.* TOWN OF SALISBURY.

October Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 25, 1904.

Poor Persons—Relief — Physician's Services — Liability of Town—Promise of Overseer—Consideration.

A town is not liable for medical services rendered a poor person prior to notice thereof to the overseer, although the overseer, when so notified, promised, in behalf of the town, to pay for such services, and they were rendered in the expectation that the town would pay for them. In such case there is no consideration for the promise, and such services do not inure to the benefit of the town.

When, in an interview in behalf of the plaintiff, who was rendering medical services to a poor person, defendant's overseer used language from which plaintiff's representative understood, and had a right to understand, that defendant would pay plaintiff's entire bill, defendant is liable for such services rendered after the overseer's promise, and in reliance thereon.

GENERAL ASSUMPSIT. Trial by court at the June Term, 1904, Addison County, *Munson,* J., presiding. Judgment for the plaintiff to recover his entire bill. The defendant excepted.

In respect of Dyer's interview with the overseer the court found: "That Dyer saw the overseer in behalf of the plaintiff on Feb. 15; that the overseer then used language from which Dyer understood, and had a right to understand, that the town would assume the payment of plaintiff's bill for this sickness; and that Dyer shortly after communicated this to the plaintiff."

Charles F. Kingsley for the defendant.

The overseer cannot bind the town to pay a poor person's debts incurred before application for aid. The town itself could not vote to do so. *Spafford* v. *Norwich*, 71 Vt. 71; *Sheldon et al.* v. *Bennington*, 67 Vt. 580.

Cushman & Russell for the plaintiff.

It is not necessary that an application for relief should be made in order to bind the town. *Weston* v. *Wallingford*, 52 Vt. 630; *Waldon* v. *Cabot*, 25 Vt. 522; *Blodgett* v. *Lowell*, 33 Vt. 174.

TYLER, J. It was found by the court below that Mrs. Lauber, who was living with her husband in defendant town, was very sick, also very poor and in need of assistance, and that Mr. Joy, her neighbor, requested the plaintiff, who was a physician residing in Middlebury, to visit Mrs. Lauber and promised to pay him for that visit. The plaintiff made the visit February 3, 1903, and then informed Joy that the woman would require attendance for a long time. Joy declined to be further responsible, and by his advice the plaintiff saw one Dyer, another neighbor, who tried to communicate by telephone with the defendant's overseer of the poor, but failing to do so advised the plaintiff to continue his visits, saying that he would see the overseer about the matter, but he did not see him until February 15th, when he had an interview with him in the plaintiff's behalf. The overseer then used language from which it is found that Dyer understood and had a right to understand that the town would assume payment of the plaintiff's charges and that he so informed the plaintiff. The court found that after the first visit, which was charged to Joy, the plaintiff rendered his services in the *expectation* that the town would pay him, and

that after Dyer's report to him, in *reliance* upon such payment.

It is apparent that the overseer undertook to assume payment of the plaintiff's entire bill, but there was no consideration for the promise to pay for the services rendered prior to February 15th. They were not rendered upon the overseer's promise to pay and did not inure to the defendant's benefit, therefore the defendant is not liable for them, but is liable for the charges made after that date.

Judgment reversed, and judgment for the plaintiff to recover the amount of his bill exclusive of the charges made prior to February 15, 1903.

PERRY PORTER *v.* H. L. BISHOP.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Opinion filed November 25, 1904.

County Court—Jurisdiction—Appeal from Justice—Motion to Dismiss.

When it appears that a case in county court is an appeal from the judgment of a justice of the peace, and nothing in the record or in the statute shows that the case was appealable, and there is no claim that it was appealable, plaintiff's motion to dismiss the case, on the ground that it was not appealable, should be granted, regardless of whether the justice had jurisdiction.

CASE. Heard, on motions to dismiss filed by each party, at the June Term, 1904, Caledonia County, *Watson*, J., presiding. Plaintiff's motion was denied. Defendant's motion was granted with costs. The plaintiff excepted. The opinion states the facts.

Cook & Norton for the plaintiff.

It is for the appellant to show that the county court had jurisdiction. *Persons* v. *Turnpike* Co., 20 Vt. 170.

The justice had no jurisdiction. *Bell* v. *Prouty*, 43 Vt. 279.

May & Hill for the defendant.

TYLER, J. Action, case, brought in a justice's court, the plaintiff alleging in his declaration that he was the owner of a certain right of way for teams and persons on foot to cross over and upon a certain piece of land described, and that the defendant, by nailing boards and bars across it, prevented the plaintiff from using the same; that the defendant had no right to make such obstruction, and that the plaintiff was damaged to the amount of twenty dollars. The defendant moved in that court to dismiss the action upon the ground that the title to land was involved, and that the justice, for that reason, had not jurisdiction, which motion was denied, and the defendant appealed to the county court where he filed a like motion, which was granted.

The plaintiff also filed a motion in the county court to dismiss the appeal upon the ground that the judgment of the justice was final under V. S., 1298, div. III, as neither the *ad damnum* in the writ nor the damages demanded in the declaration exceeded twenty dollars, which motion was denied.

The exceptions state that there was nothing in the copies of appeal to show that the case was appealable, and no claim being made that it was, there was no occasion for the county court to consider whether the justice had jurisdiction or not. As the statute gave no right of appeal, the court should have granted the plaintiff's motion.

Judgment reversed, and the appeal dismissed with costs.

RUSSELL W. TAFT *v.* AMABLE MOSSEY'S ADMINISTRATOR.

January Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed November 26, 1904.

Chancery—Interlocutory Decree—Appeal—V. S. 1629.

A *pro forma* decree overruling a demurrer to a bill in chancery is interlocutory, hence no appeal therefrom lies.

V. S. 1629, providing for passing cases to the Supreme Court on exceptions, before final judgment, has no application to suits in chancery.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the September Term, 1903, Chittenden County, *Tyler*, Chancellor. Decree *pro forma* overruling the demurrer. The defendant appealed.

Brown & Taft for the orator.

H. S. Peck for the defendant.

HASELTON, J. The orator asks to have the will of Amable Mossey construed conformably to the provisions of No. 40, Acts of 1896. The cause was heard on demurrer, general and special, to the orator's bill as amended. The demurrer was overruled *pro forma* and the bill adjudged sufficient. The cause was not further proceeded with in the Court of Chancery, but, without more, an appeal was taken to this Court. The decree rendered was, however, not final and the appeal did not lie. The cause remains in the Court of Chancery for further proceedings. *Wright & Valley* v. *Creamery Co.*, 77 Vt. 17.

We see nothing in the act above referred to, to make the case exceptional, and V. S. 1629 has no application to cases in chancery.

The practice should be uniform and well understood. It appearing on the face of the papers that the case is not now properly before this Court,

The appeal is dismissed.

STATE OF VERMONT *v.* LOREN LEACH.

October Term, 1904.

Present: TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed November 26, 1904.

Criminal Law—Statutory Rape—Punishment—Prosecution—Information.

Under V. S. 4908, as amended by No. 118, Acts of 1898, statutory rape is not punishable by imprisonment in the State's prison more than 20 years. Hence a State's Attorney can prosecute for that offence by information.

INFORMATION for statutory rape. Heard on demurrer to the information at the September Term, 1904, Orleans County, *Rowell,* C. J., presiding. Demurrer overruled. The respondent excepted.

Frank E. Miles for the respondent.

A. W. Farman, State's Attorney, for the State.

HASELTON, J. The question and the sole question in the case is raised by demurrer and is whether a State's Attorney can prosecute by information for statutory rape. This offence is not punishable by imprisonment in the State's prison more than twenty years. V. S. 4908 as amended by Acts of 1898, No. 118. Hence the State's Attorney can prosecute. V. S. 1867 as amended by Acts of 1898, No. 46.

The action of the trial court in overruling the respondent's demurrer and adjudging the information sufficient is sustained and the

Cause is remanded for trial.

LUTHER BAKER, ET AL. *v.* F. M. SHERMAN, ET AL.

January Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON and HASELTON, JJ.

Opinion filed November 26, 1904.

Statute of Limitations—Arrest of Judgment—New Action—V. S. 1214.

The judgment of the Supreme Court in *Baker* v. *Sherman*, 73 Vt. 26, compelled the plaintiffs to elect either to amend their declaration

and have a new trial on the terms imposed, or to have judgment arrested; and their election to submit to an arrest of judgment was not voluntary, and therefore did not bar a new action for the same cause within a year, as authorized by V. S. 1214.

CASE for fraud in the sale of real estate. Pleas, the general issue, and Statute of Limitations; replication to the plea of the Statute of Limitations; rejoinder to the replication; traverse of the rejoinder. Trial by court on the issue raised by the traverse of said rejoinder, at the September Term, 1903, Franklin County, *Watson,* J., presiding. Judgment for the plaintiffs. The defendant excepted.

This case has been once before in the Supreme Court, see *Baker* v. *Sherman,* 75 Vt. 88, where the pleadings are sufficiently stated. The only difference in the pleadings here is that the rejoinder is traversed instead of being challenged by demurrer.

Rustedt & Locklin, Farrington & Post, and *Young & Young* for the defendants.

Plaintiffs cannot bring a new action within a year after judgment in the former suit was arrested as authorized by V. S. 1214, because by choosing to have judgment arrested they voluntarily abandoned the former action. Wood, Limitations, 3rd Ed. § 296; Buswell, Limitations § 361; Angell, Limitations, 6th Ed., § 327; 19 A. & E. Enc. L. 267; Phelps *et al.* v. *Wood,* 9 Vt. 399; *Speare et al.* v. *Newell,* 13 Vt. 288; *Hayes* v. *Stewart et al.* 23 Vt. 622; *Poland* v. *Grand Trunk Ry. Co.,* 47 Vt. 73; *Swan* v. *Littlefield,* 6 Cush. 417; *Packard* v. *Swallow,* 29 Me. 458; *Holmes* v. *Chicago,* 94 Ill. 439; *Spiers* v. *McQueen,* 1 Mich. 252; *Clark* v. *Stevens,* 55 Iowa 361; *Archer* v. *Chicago & G. R. R. Co.,* 65 Iowa 611; *Pardey* v. *Mechanicsville,* 112 Iowa 68; *Harris* v. *Dennis,* 1 Serg. & R., (Pa.) 236; *Siefried* v. *R. Co.,* 50 Ohio St., 294; *Null*

v. *Canal Co.*, 4 Ind. 431; *Young* v. *Mackall*, 4 Md. 367; *Jones* v. *Swanson*, 3 Head. (Tenn.) 162; *Bell* v. *Elliot*, 8 La. Ann., 453; *Elliot* v. *Brown*, 13 La. Ann., 579; *Lawrence* v. *Winnifred Coal Co.*, 48 W. Va., 139; *Hanks* v. *Williams*, 1 Cheves Eq., 203 (S. C.); *Borino* v. *McGee*, 3 McCord, 452 (S. C.); *Shield* v. *Boone*, 22 Texas 193; *Hughes* v. *Lane*, 25 Tex. 356; *Highsmith* v. *Messery*, 25 Tex. Sup., 96; *Connolly* v. *Hammond*, 58 Tex. 11; *Flannagan* v. *Pearsons*, 66 Tex. 302; *Doyle* v. *Wade*, 22 Fla. 90; *Carroll* v. *Alabama, G. S. R. Co.*, 60 Fed. R. 459; *Waydell* v. *Gabrielson*, 72 Fed. R. 648; *Richards* v. *Maryland Ins. Co.*, 8 Cranch 84; L. Ed. 496; *Willard* v. *Wood*, 164 U. S. 592; 41 L. Ed. 531; *Smith* v. *Brown* (3 D. & E. 662) *Napier* v. *Foster*, 80 Ala. 379.

George W. Burleson, Alfred A. Hall and *H. Henry Powers* for the plaintiffs.

HASELTON, J. This action was case for alleged fraudulent representations in the sale of real estate. Trial by the court was had on the issue raised by a plea of the Statute of Limitations, replication thereto, rejoinder to the replication and traverse of the rejoinder. On these pleadings and facts found by the court judgment was rendered *pro forma* for the plaintiffs. The general issue to the declaration was pleaded, but for sufficient reasons the trial proceeded as above stated with the understanding that if the issue tried by the court was finally determined in favor of the plaintiffs the cause should be remanded to the county court for trial on the general issue and such other pleadings as might be proper.

This is the same case that is reported in volume 75 of Vermont Reports on pages 88 to 92 inclusive, 53 Atl. 330, 331, and the pleadings here involved are, with the exception

of the traverse, there stated in the opinion with a fullness sufficient for the consideration of the case in its present aspect. The case as before made up for the Supreme Court, stood, however, upon a special demurrer to the rejoinder. The only claim made by the plaintiffs was that the rejoinder amounted to a general denial. This claim was not sustained and it was considered that the defendants had rejoined by way of confession and avoidance.

This suit is for the same cause of action as a cause formerly brought by the plaintiffs against the defendants and tried on a plea of the general issue at the September Term, 1899, of the Franklin county court. In that case a verdict for the plaintiffs was on such trial returned. After verdict the defendants filed a motion in arrest of judgment on the ground of the insufficiency of the declaration. This motion the trial court overruled and rendered judgment on the verdict. The defendants excepted and the case was passed to the Supreme Court. The case is reported in volume 73 of Vermont Reports, and the opinion and judgment order, as found on pages 26 to 34 inclusive, and 50 Atl. 633-636, are referred to in the finding of facts herein and are made a part thereof.

The main question raised by the facts found and reported is whether the plaintiffs voluntarily abandoned the former suit.

The court below treated this as a question of law on the facts found; and the nature of the facts found was such that the trial court was clearly right in this regard. In the former suit the defendants after verdict moved in arrest of judgment. On the question thus raised the defendants finally prevailed, the Supreme Court holding the declaration bad on motion in arrest. Had the Court thereupon simply arrested judgment no question could be made but that under V. S.

1214 the plaintiffs' cause of action would have been saved to them. What the Court undertook to do was to give the plaintiffs an option such that an election under it would be without prejudice. The Court granted leave to amend and a new trial on terms imposed, and ordered that if a new trial was not wanted on the terms imposed judgment should be arrested. An arrest of judgment rather than a non-suit was ordered as the alternative of a new trial lest on non-suit the cause of action should be lost by lapse of time.

The case was remanded to the county court and the plaintiffs elected to submit to an arrest of judgment rather than to amend the writ and proceed to a new trial on the terms imposed. It is now claimed that this election between the two courses made the submission to an arrest of judgment a voluntary abandonment of the suit. But it is to be observed that this was not a case in which the plaintiffs could do either or neither of two things. They sought to hold the verdict which they had obtained but were compelled to abandon it and to take one of two courses, both of which were against their will. Under such circumstances the taking of one course rather than the other does not make the course taken voluntary in any proper sense. If on conviction a respondent is sentenced to pay a fine or to undergo imprisonment, his "election" or "choice" not to pay the fine does not lend a voluntary character to the alternative imprisonment. Numerous illustrations of the principle here stated will occur to every one. In submitting to an arrest of judgment when in a dilemma not of their own seeking but forced upon them, the plaintiffs were acting under judicial compulsion. In the decision of the former case this Court marked out no course for the plaintiffs to pursue, but simply granted the option which it did and compelled its exercise, giving at the same time clear expression to its understanding that, however the

plaintiffs might act in obeying the Court, their right of action, if any they had, would not be forfeited. The obvious understanding of the Court was consonant with reason and justice, and it is held that the plaintiffs did not voluntarily abandon the former suit. This action was commenced within one year after the determination of the former action by arrest of judgment in the way indicated, and the cause of action was not barred by the Statute of Limitations unless V. S. 1214 is construed to permit the bringing of but one suit within the year limited. Within the year limited the plaintiffs brought a suit for the same cause of action as the first one and then abandoned that and brought this. But that fact is immaterial in view of the construction which without hesitation we put upon V. S. 1214. Various exceptions to the reception of evidence were taken by the defendants but this decision depends upon facts not in dispute and so these exceptions need not be considered.

The pro forma judgment of the county court is affirmed, and the cause is remanded.

JOHN E. ANDREWS *v.* CLAYTON CARL.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON and POWERS, JJ.

Opinion filed December 6, 1904.

Trover—Conversion — Lawful Possession — Estrays — Demand—Statute of Limitations.

Conversion, when applied to the law of trover, imports an unlawful act, and mere nonfeasance is not enough.

The mere neglect of defendant, who took up plaintiff's stray heifer, to post and advertise it as required by the statute, did not constitute a conversion thereof so as to start the Statute of Limitations before demand and refusal.

TROVER for a cow. Plea, the general issue. Trial by jury at the September Term, 1903, Chittenden County, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

C. J. Russell, and *E. C. Mower* for the defendant.

The cause of action accrued at the time defendant failed to post and advertise as required by the statute. *Chaffee* v. *Harrington*, 60 Vt. 718; *Carr* v. *Bennett*, 21 Ill. App. Div. 137.

Plaintiff's ignorance of the existence of his cause of action makes no difference. *Smith* v. *Bishop*, 9 Vt. 110.

C. J. Ferguson and *V. A. Bullard* for the plaintiff.

Mere nonfeasance does not make a party a wrong doer *ab initio*. *Ordway* v. *Ferrin*, 3 N. H. 69; *Parker* v. *Pattee*, 4 N. H. 530; *Gardner* v. *Campbell*, 15 Johns 401; *Ferrin* v. *Symonds*, 11 N. H. 366; Story, Bailments, (9th Ed.) § 87.

There could be no conversion till demand and refusal. *Downer* v. *Phoenix Bank of Charleston*, 6 Hill 297; *Isaack* v. *Clark*, 2 Bulst 306; *Sibley* v. *Story*, 8 Vt. 15; *Jackman* v. *Partridge*, 21 Vt. 558; *Doherty* v. *Mudgett*, 58 Vt. 323.

ROWELL, C. J. Trover for a cow. The plaintiff's heifer calf strayed from his inclosure in 1895, and was soon after taken up by the defendant, but was not posted and advertised by him according to the statute, though he inquired of several if they had lost a heifer. His testimony tended to show that the calf grew up on his farm, and that he had had

the use of it under a claim of ownership. The plaintiff discovered the cow in the defendant's possession just before suit brought, and demanded her of him, but he refused to give her up. No question was made on trial but that the plaintiff lost a heifer as he claimed, and the defendant admitted that one came into his possession soon after, but he denied that it was the plaintiff's, and the questions of identity and damages were the only questions submitted to the jury or asked to be submitted. The defendant pleaded the Statute of Limitations, and moved for a verdict because the action was barred thereby, which was refused. The case as presented does not involve a consideration of the defendant's use and claim of ownership, for that matter was not submitted to the jury, and is not now relied upon; but the defendant puts his case solely on the ground that "the cause of action accrued *ab initio* without demand or notice, and more than six years before suit brought." This assumes, we suppose, that the mere neglect of the defendant to post and advertise as he should, made him a wrongdoer and constituted a conversion. But conversion, when applied to the law of trover, imports an unlawful act, and a mere nonfeasance is not enough. It is generally laid down that any act that is an interference with the owner's dominion and right of property is a conversion. But from the nature of the action of trover, it must be an interference that cannot, as against the owner, be justified nor excused by one who comes lawfully into possession. Here the defendant came lawfully into possession, and it does not appear that he did anything afterwards and before the demand and refusal, that could not be justified or excused as against the plaintiff, and that was hostile to his dominion and right of property; hence the statute is no bar.

Judgment affirmed.

STATE *v.* ELMER E. ST. JOHN.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 26, 1905.

Hunting Deer—No. 94, Acts 1896—Deer "Having Horns"—Construction.

In a prosecution for killing a deer not "having horns," in violation of No. 94, Acts 1896, when it is undisputed that the deer had horns only to the extent of bunches which did not protrude through the skin, whether these bunches were "horns," within the meaning of the statute, is a question of law for the court.

A deer which has no horns protruding through the skin, so that they can be seen to be horns, is not a deer, "having horns," within the meaning of No. 94, Acts 1896.

INFORMATION for unlawfully killing a wild deer. Plea, not guilty. Trial by jury at the March Term, 1904, Rutland County, *Tyler,* J., presiding. Verdict, guilty; judgment and sentence thereon. The respondent excepted.

Subject to the objection and exception of the respondent, the court ruled and instructed the jury that, "The horns must be visible, not merely so that they can be discovered by a bunch after the animal is killed, but they must be visible so that they are notice to the hunter that he may kill the animal in the open season."

The respondent claimed the right to go to the jury upon the question whether the bunches described by the evidence were, in fact, "horns," and excepted to the refusal of the court to allow him to do so.

Butler & Moloney for the defendant.

As the statute was construed by the court, the respondent's liability depends upon his ability to see the horns. A penal statute must be construed strictly. Clark Crim. L. 28; *U. S.* v. *Hartwell,* 6 Wall. 395; 23 A. & E. Enc. 374.

The action of the court was, in effect, the direction of a verdict of guilty, which is never allowed in a criminal case. 12 Cyc. 595.

William H. Preston, State's Attorney, for the State.

START, J. The respondent was convicted in the court below of the offence of killing a wild deer, not having horns. Upon the whole evidence, including that of the respondent, the court ruled and instructed the jury that the deer in question did not have horns, within the meaning of the statute which permits the killing of deer having horns, during the open season. In this there was no error. The respondent testified that the bunches, which he called horns, did not protrude through the skin of the deer; and the other testimony had but one tendency, and that was that no horns or other substance protruded through the skin. Such being the undisputed evidence, it became the duty of the court to rule upon the question whether the deer had horns, within the meaning of the statute; and its ruling, that the substances under the skin of the deer, which some of the witnesses called horns, was correct. It was not intended by the enactment to permit the killing of deer during the open season, except deer that have horns that protrude through the skin so that they can be seen; and it can be ascertained and known that the deer have horns without cutting through the skin of the deer and examining the substance thereunder to ascertain the fact. We, therefore, hold that a deer which has no horns protruding through the skin so that they can be seen and ascertained to be horns

is not a deer "having horns," within the meaning of the statute; and that it is unlawful to kill such a deer.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let execution be done.

CAROLINE WHEELER *v.* EDGAR WHEELER.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 26, 1905.

"Justice Ejectment"—Evidence—Statute of Frauds—Notice to Quit—Necessity—Reasonableness—Question for Jury.

The action commonly called "justice ejectment" does not lie against one in the possession of lands or tenements, unless he is a technical lessee thereof, and all his title and right therein, both legal and equitable, has ceased.

In an action of "justice ejectment," when the plaintiff testifies that the defendant was in possession of the farm in question under an oral contract that, if he would live with her thereon and do by her as a son ought, he should have what was on the place and should have a home with her as long as she lived; regardless of whether this made defendant a lessee of the farm, and notwithstanding the Statute of Frauds, he has the right to meet this testimony by showing that he was in possession under an oral agreement such that he was not a lessee of the premises.

In an action of "justice ejectment," though there is no written agreement in respect of defendant's occupancy of the premises in question, the plaintiff cannot insist upon the Statute of Frauds.

In an action of "justice ejectment," when the defendant's evidence tends to show that his possession of the premises in question

was under a contract over which the justice had no jurisdiction; that he had not broken the contract; and that he was not wrongfully in possession of the premises; the court properly denied plaintiff's motions for a verdict, and for a judgment notwithstanding the verdict.

In an action of "justice ejectment," as bearing upon the claim of the defendant that his possession of the farm in question was under a contract with the plaintiff, by which he was to own the farm when plaintiff was through with it, the defendant was properly allowed to show that he had permanently improved the farm, had constructed several buildings thereon, had purchased a spring of water and constructed an aqueduct, had bought farming tools; and that plaintiff had made her will in his favor, willing him the farm.

Although no notice to quit is necessary in order to maintain justice ejectment, when the defendant is a lessee, holding over after the termination of the lease by its own limitation, or after a breach by him of a stipulation contained therein, yet, if the plaintiff tries her case upon the theory that she must show that she gave defendant a reasonable notice to quit, and gives evidence tending to show that she did so, it is for the jury to say whether, under all the circumstances, the notice was reasonable.

JUSTICE EJECTMENT. Plea, the general issue. Trial by jury at the March Term, 1904, Washington County, *Stafford,* J., presiding. Verdict for the defendant, and judgment thereon. The plaintiff excepted.

Besides the general verdict for the defendant, the jury found specially that the contract was as claimed by the defendant. "The defendant claimed, and his evidence tended to show, that the contract under which he came to live with his mother was that he was to stay with her, carry on the place, and when she got through with it, he was to have it; that he was to fix it up, and whatever he fixed he should have after his mother got through with it; that they were each to pay one-half of the expenses of the family."

H. C. Shurtleff and *H. W. Scott* for the plaintiff.

The agreement to pay rent is not necessary to create the relation of landlord and tenant. Taylor, L. & T. (Ed. 1879) 15-18; 18 Enc. Pl. & Pr. 165, 167.

This was at most a tenancy at will under V. S. 2218, and no notice to quit was necessary. *Amsden* v. *Blaisdell,* 60 Vt. 390; *Chamberlain* v. *Donohue,* 45 Vt. 55; *Rich* v. *Bolton,* 46 Vt. 87; *Gould* v. *Thompson,* 4 Met. 224; *Ellis* v. *Paige,* 1 Pick 43.

J. P. Lamson for the defendant.

START, J. The action, commonly called "justice ejectment," was returnable before a justice of the peace, and brought under V. S. 1560, which provides that, when a lessee of lands or tenements, whether the lease is by writing or parol, or when a person holding under such lease, holds possession of said demised premises without right, after the determination of the lease by its own limitation, or after breach of a stipulation contained in the lease by the lessee or a person holding under him, the person entitled to the possession of the premises may have from a justice a writ to restore him to the possession thereof.

The right of the plaintiff to maintain her action depended upon her showing facts which brought her case within this statute. The burden was on her to show that the defendant was in the possession of the premises under a lease, written or parol, and that the lease had terminated by its own limitation, or that there had been a breach, on the part of the defendant, of a stipulation contained therein. The statute giving a justice jurisdiction in such cases applies to no other holding of premises. It does not apply to a detainer of lands and tenements, unless they are held by a technical lessee after all title and right in him, both legal and equitable, has ceased.

Davis v. *Hemenway*, 27 Vt. 589; *Pitkin* v. *Burch*, 48 Vt. 521. It is evident that the plaintiff, in the court below, understood that the burden was on her to show that the defendant was in possession under a lease, which had terminated by its own limitation, or by reason of a breach, by the defendant, of a condition contained therein, for she gave evidence tending to show, that, prior to 1888, she was living alone on the farm in question; that she told the defendant, that, if he would come and live with her and do as a son ought by her, he should have what was on the place and should have a home with her while she lived; that the defendant moved on to the farm and lived with her until 1902, when he choked and scratched her; that he became unduly intimate with a woman who kept house for him; and that, because of this, she left the place and went to live with her daughter. It is unnecessary to decide, and we do not decide, whether this testimony tends to show that the defendant was a lessee of the premises. It is sufficient to say, that the defendant, notwithstanding the statute of frauds, which was insisted upon by the plaintiff, had a right to meet the testimony of the plaintiff by showing that he was not a lessee of the premises, and that the case was not one over which a single justice had jurisdiction. For this purpose, he was properly allowed to show, that the contract, under which he went to live with his mother, was, that he should stay with her, carry on the place, fix it up, each should pay half the expense of the family, and, when she was done with the place, he was to have it; that, under this agreement, he went on to the farm, made various improvements, always used his mother as a son should; and that she left the farm without cause.

There being no written agreement between the parties respecting the defendant's occupancy of the premises, the plaintiff was not in a situation so she could rightfully insist

upon the Statute of Frauds. In order to make a case over which the justice had jurisdiction, she was under the necessity of resorting to oral evidence of the contract under which she claimed the defendant was in the possession of the premises as lessee; and what that contract was, was an issue brought by the plaintiff into the case; and the defendant could, by oral evidence, disprove the contract which the plaintiff's evidence tended to show. The defendant's evidence tended to show, that the contract, under which he went to live with his mother, was one over which a justice of the peace had no jurisdiction; that there had been no breach of the contract on his part; and that he was not wrongfully in the possession of the premises. Such being the tendency of the evidence, the court could not rightfully order a verdict for the plaintiff; and her motions for a verdict, and for a judgment notwithstanding the verdict, were properly denied. As bearing upon the question of whether the holding of the premises was as the plaintiff claimed, or as the defendant claimed, the defendant was permitted to show, subject to the plaintiff's objection and exception, that he had improved the farm, had built a horse barn, a manure shed, a carriage house, lean-to, a portico, shingled the house, bought a spring of water, laid thirty rods of lead pipe to the house, cleared the rocks from a large part of the farm, purchased farming tools, and whereas he had only one cow and one horse when he went there, he now kept from eleven to thirteen cows; and that the plaintiff made a will in his favor, willing him the place. This evidence tended to render the defendant's claim, that he was to have the farm when his mother was through with it, more probable, and was admissible. *Armstrong* v. *Noble,* 55 Vt. 428; *Houghton* v. *Clough,* 30 Vt. 312.

If the defendant had been a lessee, holding over after the lease had terminated by its own limitation, or after a breach by him of a stipulation contained therein, no notice to quit would have been necessary. *Horan* v. *Thomas,* 60 Vt. 325, 13 Atl. 567. But the plaintiff did not raise this question in the court below. On the contrary, she tried her case upon the theory that, in order to recover, she must show that she gave the defendant reasonable notice to quit; and she gave evidence tending to show that, in the latter part of January, 1903, she gave him notice to yield to her the possession of the premises on or before May 1, 1903; and she asked the court to rule, as a matter of law, that the notice was reasonable. This the court declined to do. In this there was no error. The reasonableness of the notice depended largely upon circumstances, such as the time required for the removal of buildings, sale or other disposition of crops and other property raised or produced on the farm, and the procuring of other accommodations. *Amsden* v. *Blaisdell,* 60 Vt. 386, 15 Atl. 332. The plaintiff having made the reasonableness of her notice to quit an issue in the case, and insisted upon it, it was for the jury to say whether, under all of the circumstances disclosed by the evidence, the notice was reasonable.

Judgment affirmed.

HIRAM O. MILLER v. BETSEY C. STEBBINS.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and POWERS, JJ.

Opinion filed January 26, 1905.

Promissory Note—Collateral Security—Pledgor's Right to Collect—Forgery—Evidence—Payee's Poverty — Husband and Wife—Husband's Interest in Suit—Wife as Witness—Agency.

A note pledged by the payee as collateral security cannot be collected by him while it is so pledged, without first paying the sum thus secured.

In an action on a note for $200 by the vendee of the payee against the alleged maker, who claims the note to be a forgery, defendant will not be allowed to show that at a certain time, while the payee owned the note, his family was very destitute, his children needed clothing, his family needed bedding, his neighbors furnished clothing for his children and bedding for his family, and his house was hardly fit to live in; it appearing that, during all that time, the note was pledged by the payee as collateral security for the payment of a debt exceeding $100, and that the payee was a poor man, pressed for money, and had all he could do to live.

The exceptions sufficiently show that the plaintiff paid valuable consideration for a note, when it appears that the payee pledged it to plaintiff as collateral security for a loan made to him by the plaintiff, who also made other loans to the payee, relying on the note as security, and who later purchased the note from the payee.

When a note is sold by the payee for a valuable consideration, nothing more appearing, the payee impliedly warrants that the note is genuine and what it purports to be; and, therefore, the payee is so interested in the event of a suit on the note by the purchaser against the purported maker, who claims the note to be a forgery, that the payee's wife is not a competent witness for the plaintiff.

A wife does not act as the agent of her husband within the meaning of V. S. 1241, so as to make her a competent witness in a suit in the event of which he is interested, when all that she did was done in his immediate presence and under his supervision and direction, and he could testify as fully as she could respecting the whole matter, although, because of his illiteracy, he could not do some of the things which she thus did at his direction.

ASSUMPSIT on a promissory note. Pleas, the general issue, with notice denying the signature; and the Statute of Limitations. Trial by jury at the March Term, 1904, Orleans County, *Haselton,* J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

J. W. Redmond for the defendant.

The evidence offered as to the poverty of Crawford and his family should have been admitted. *Strong* v. *Slicer,* 35 Vt. 40; *Randall* v. *Preston,* 52 Vt. 108; *McDowell* v. *McDowell's Est.,* 75 Vt. 404; *Downer* v. *Bowen,* 12 Vt. 452; *Kimball* v. *Locke,* 31 Vt. 683.

O. S. Annis for the plaintiff.

Crawford could not have collected the note at the time indicated by defendant's offer to show the poverty of Crawford's family. The note was then pledged. Byles, Bills (6 Ed.) 5; *Blaney* v. *Pelton,* 60 Vt. 278; *Bank* v. *Adams,* 70 Vt. 132.

It does not appear that Crawford so transferred the note to plaintiff as to make Crawford liable on an implied warranty. It does not appear but what plaintiff purchased and agreed to take all risks. Error will not be presumed. *Armstrong* v. *Noble,* 55 Vt. 428; *Gilchrist* v. *Hilliard,* 53 Vt. 592.

But, if Crawford was interested in the event of the suit, his wife was a competent witness, for she acted as his agent. He could neither read nor write. He could not write the note. She did what he could not do and so was his agent. That is the meaning of our decisions in the matter. When he is absent he could not do the act committed to her, because he was not present. Here he could not perform the act committed to her, because, though present, he could neither read nor write.

START, J. The action is for the recovery of the amount claimed to be due upon a promissory note for the sum of two hundred dollars, dated October 15, 1896, payable to A. J. Crawford, or bearer, on demand, and purporting to be signed by the defendant. The evidence of the plaintiff tended to show that the note was given for two hundred dollars loaned by Crawford to the defendant on the day the note purports to have been executed; that the defendant executed and delivered the note to Crawford on that day, and he held it until the spring or summer of 1897, when he turned it out to one George Miller as collateral security for the purchase price of some cows at that time purchased by him of Miller, and as collateral security for liability assumed by Miller in signing bank notes for him; and that Crawford continued to owe Miller, and Miller continued to sign notes with Crawford and continued to hold the note in question as such collateral security until Crawford let the plaintiff have the note, which was sometime in the winter of 1902-3.

The defendant's evidence tended to show that she did not sign the note; that she never borrowed any money of Crawford; and that she was never indebted to him. The defendant offered to show that, during the fall of 1897 and the winter of 1898, Crawford's family was needy and very desti-

tute; that the children then needed clothing; that the family needed bedding; that his neighbors furnished clothing for his children and bedding for his family; and that his house was hardly fit to live in. The court excluded the offered evidence. In this there was no error. The note was not in Crawford's hands during any of the time covered by the offer of the defendant, It was then held by Miller as collateral security for the payment of an indebtedness exceeding one hundred dollars. Crawford could not collect the note while it was so held by Miller, without first paying the sum for the payment of which it was held as collateral security. The offered evidence, if it had been admitted, would have tended to show that Crawford's circumstances were such that he could not redeem the note. Also, it is stated in the exceptions, that it appeared that Crawford was, during this time, a poor man, pressed for money and had all he could do to live. This means that there was no controversy over the question of Crawford's poverty. It is clear that Crawford was not circumstanced so he could redeem the note and make it available for the support of his family; therefore, no legitimate inference could have been drawn from the offered evidence, against the validity of the note.

A. J. Crawford, the payee of the note, was produced as a witness by the plaintiff and, among other things, testified that, on the 15th day of October, 1897, the date of the note in question, the defendant came from her part of the house into his tenement and asked him to loan her two hundred dollars; that he consented to do so; that his wife was then present; that he could neither read nor write, but could write his name; that he instructed his wife to write the note in question; that his wife did then, in his presence and in the presence of the defendant, write the note in question; that his

wife, then in his presence, read said note to the defendant; that his wife then handed said note to the defendant in his presence; that the defendant then, in his presence and in the presence of his wife, signed the note in question. Said Crawford was shown the note in question on the stand and testified that he recognized the note, and that it was the same note that was signed as above set forth. He further testified that, after the defendant had thus signed the said note, he instructed his wife to get the money; that his wife then went into an adjoining bedroom and got the money and delivered same to him. He further testified that he then counted out two hundred dollars, handed same to his wife, and she handed said amount to the defendant, who took it and departed with it into her part of the house; that, after defendant had departed, he took the note in question and delivered same to his wife to keep.

After this testimony had been introduced, the plaintiff produced Mrs. Crawford, the wife of A. J. Crawford, as a witness, and, on the ground that she was the agent of her husband in doing the things testified to by him, and subject to the defendant's exception, she was allowed to testify to the same things testified to by her husband. In this there was error. The husband was present and had personal knowledge of every material fact testified to by the wife. Every thing was done under his supervision, direction and in his immediate presence. He had personal knowledge of every thing that was said and done in the presence of the defendant, and, although he could not read and write, he could see and hear and was able to and did testify as fully as his wife did respecting all the circumstances attending the claimed loan of the money and the taking of the note. Under these circumstances, a wife is not the agent of her husband and is

not a competent witness on the ground of agency, in a suit where the husband is interested in the result. V. S. 1241; *Bates* v. *Sabin,* 64 Vt. 511, 24 Atl. 1013; *Pingree* v. *Johnson,* 69 Vt. 225, 39 Atl. 202.

The plaintiff's counsel insists that Crawford was not interested in the event of the suit, and that, irrespective of the statute allowing a wife to be a witness in matters intrusted to her by her husband, she was a competent witness; but the case shows that the husband was a party in interest. The evidence, which in so far as appears was uncontradicted, showed that Crawford, in the winter of 1902-3 obtained the note from George Miller and immediately turned it out to the plaintiff as collateral security for a loan then made to him by the plaintiff; and that the plaintiff made other loans of money to Crawford, relying upon the note as security, until the following spring, when he purchased it of Crawford. From this evidence, it sufficiently appears that the plaintiff paid a valuable consideration for the note; and that, if the note was a forgery, Crawford was holden to the plaintiff upon an implied warranty that the note was what it purported to be. When a note is thus transferred by the payee, nothing more appearing, there is an implied warranty that the note is genuine and what it purports to be. *Thrall* v. *Newell,* 19 Vt. 202; *Gilchrist* v. *Hilliard,* 53 Vt. 592; *Hannum* v. *Richardson,* 48 Vt. 508; *Labaree* v. *Wood,* 54 Vt. 452.

Judgment reversed, and cause remanded.

CAPITAL SAVINGS BANK & TRUST CO. *v.* MONTPELIER SAVINGS BANK & TRUST CO.

October Term, 1904.

Present: TYLER, MUNSON, START, WATSON, HASELTON and POWERS, JJ.

Opinion filed January 26, 1905.

Negotiable Paper—Checks Originating in Fraud—Bona Fide Purchaser—Requisite Vigilance—Burden of Proof—Findings of Trial Court—Failure to Find Requisite Vigilance of Plaintiff—Reversal of Failure to Find.

When the payee of a check, which, on account of his fraud, is invalid as between him and the drawer, transfers it to a third person who brings suit thereon against the drawer, the burden is on the plaintiff to show that he took the check in the usual course of business, for valuable consideration, without knowledge of facts which impeached its validity as between the original parties thereto, and without knowledge of facts or circumstances which would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties.

In such case, if the circumstances would excite the suspicion of a prudent man as to the validity of the paper as between the antecedent parties to it, and the purchaser takes it without inquiry, he is not a *bona fide* purchaser, though he paid value for it.

In such case, whether the plaintiff, as a careful and prudent person, had reason to suspect, when it took the check, that it was invalid as between the parties thereto, is a question of fact.

A check for $1,000 was invalid as between the drawer and payee because of the latter's fraud. The payee, for valuable consideration, transferred the check to the plaintiff, who brought suit thereon against the drawer. The trial court found that when the plaintiff took the check its officers knew that the payee was financially irresponsible and a forger; that he had, four days before, defrauded the plaintiff by procuring it to discount, as genuine, a note for $300, on which he had forged the name of the surety and the approval of plaintiff's president; that plaintiff's president had reason to suspect—what was the fact—that the payee had forged the

name of the surety to a $1,700 note which he had fraudulently procured the plaintiff to discount, as genuine, and which it then owned. *Held*, that the failure of the trial court to find that the plaintiff, as a careful and prudent person, had no reason to suspect, when it took the check, that the same was invalid as between the original parties thereto will not be reversed; and that it cannot be said that the equities are with the plaintiff and it is entitled to recover the amount of the check notwithstanding the failure of the trial court to make said finding.

ASSUMPSIT on a bank check. Plea, the general issue. Trial by court at the March Term, 1904, Washington County, *Rowell,* J., presiding. Judgment for the defendant on the facts found. The plaintiff excepted.

The court found that Harkness was a physician who located at Montpelier some three or four years before the trial; that he soon began to procure small loans at the plaintiff bank on notes signed by himself and purporting to be signed by H. S. Peck; that some of the notes, and perhaps all, were for a time in fact signed by Peck; that these notes were paid and taken up from time to time by renewals for a larger amount, and the difference paid to Harkness in money; that matters ran along thus till October 31, 1902, when Harkness executed and delivered to the plaintiff a note for $1,700 of that date on demand, signed by himself and purporting to be signed by said Peck, for which he received two notes then in the bank and the difference, $184.76, in money. It did not appear whether Peck's name was forged on the notes taken up, but it was forged on said note for $1,700.

On March 2, 1903, Harkness executed and delivered to the plaintiff a note of that date for $300 on six months, which also purported to be signed by Peck. He received for that note a note for $150 dated July 2, 1902, on one year,

signed by him, and purporting to be signed by Peck, and the balance, less discount, was paid to him in money.

Harkness forged Peck's name on the note for $300, and also forged the approval of plaintiff's president on it, and the plaintiff took the note when its president was not in. But he soon came in, and knowing he had not approved it, took it at once to Mr. Harkness' office, when Harkness admitted to him that he forged both his approval and Peck's name thereon. Harkness asked plaintiff's president what he was going to do about it, and without telling him, plaintiff's president asked him what he was going to do about it, and intimated that he had better fix it up. Harkness said that if they would wait until the next night he would pay the bank all he owed it and that he would send for his friends to come, and named his brother who lived in Charlotte. The matter was left in that way, Harkness understanding that if he fixed it up then it would be all right so far as the plaintiff was concerned. Harkness saw plaintiff's president the next day, and told him it would be impossible for him to fix it up that night as he had promised, for his brother had not come as he expected, but that he had no doubt he could fix it the next day. The next day, which was March 6, 1903, Harkness presented to the defendant bank a note for $2,060 on six months, signed by himself and purporting to be signed by H. S. Peck, Mrs. Neliie Barstow, and Walter Gates, but all the names except that of Harkness were forged by Harkness. The check in suit was given to Harkness as part of the consideration of said note, and the balance was paid to him in money.

About three o'clock in the afternoon of the same day, the closing hour of the plaintiff's bank, Harkness came to the bank with the check in suit, indorsed it in blank and delivered it to the plaintiff bank and also paid the bank $1,000 in money

and took up the note for $1,700, and the note for $300, and went to the office of plaintiff's president and held them out to him and asked him if he wanted them. The president saw that the bank's stamp of payment was on them, and said he did not want them, but was glad that they were paid, and told Harkness to "go and do so no more." Thereupon Harkness crushed the notes in his hand and went out. Before Harkness came to the plaintiff bank as aforesaid, he telephoned to it and inquired the amount of said notes and the treasurer told him what the amount was.

About three o'clock that afternoon the defendant bank discovered the forgery of the note it had taken, and about seven o'clock that evening, learning that the plaintiff bank had the check, notified it that the check was obtained from the defendant by fraud and forgery, and that the defendant would not pay it. The check came into the plaintiff bank after the time for exchanging checks with the defendant that day, the course of business between the parties being to exchange checks every day about two o'clock, and so was not presented till the next day, when payment was demanded and refused, and the check protested.

At the time plaintiff's president talked with Harkness as aforesaid, he feared that Peck's name was forged on the note for $1,700 as well as on the note for $300.

After reciting the above facts, the "Facts Found" concludes as follows: "On these facts we fail to find that the plaintiff, as a careful and prudent concern, had no reason to suspect when it took said check that it was invalid as between the original parties thereto."

T. J. Deavitt, and *Edward H. Deavitt* for the plaintiff.

From the facts found the court should have inferred that the plaintiff had no reason to suspect, at the time it took

the check, that the same was invalid between the original parties thereto. The findings and judgment of the court are reviewable to this extent. *Card* v. *Sargent,* 15 Vt. 393; *Bigelow* v. *Congregational Society,* 15 Vt. 370; *Stevens* v. *Hewett,* 30 Vt. 262; *Bromley* v. *Hawley,* 60 Vt. 46; *In Re Mather's Will,* 76 Vt. 209.

The plaintiff was a *bona fide* purchaser of the check for value, while current. An acceptance of the check and surrender of the notes constituted a payment of a debt. *Russell* v. *Splater,* 47 Vt. 273; Daniel Neg. Inst. § 832; *Hutchins* v. *Olcutt,* 4 Vt. 549; *Wemet* v. *Lime Co.,* 46 Vt. 458; *Bank of Republic* v. *Baxter,* 31 Vt. 101.

The plaintiff had no knowledge that the check had been procured by fraud. Actual knowledge, and not constructive knowledge, is the test of good faith in such a case as this. *Ormsbee* v. *Howe,* 54 Vt. 182; *Limerick Bank* v. *Adams,* 70 Vt. 132; *Jones* v. *Gordon,* 4 Eng. Rul. Cas. 416; *Powers* v. *Ball,* 27 Vt. 662.

But, if good faith is not the test, and the standard of a prudent man under the circumstances should be applied, the facts found by the court below show that the plaintiff had no reason to suspect fraud. *Bank* v. *Goss,* 31 Vt. 315; *Bromley* v. *Hawley,* 60 Vt. 46; Daniel Neg. Inst. § 775; *Credit Co.* v. *Howe Machine Co.,* 54 Conn. 357; *Brush* v. *Scribner,* 11 Conn. 388.

M. E. Smilie for the defendant.

START, J. The action is assumpsit, declaring on a bank check for one thousand dollars, issued by the defendant to W. R. Harkness, and by him indorsed to the plaintiff. The trial court found and filed its findings as is required by the statute. The check was obtained by Harkness from the de-

fendant by fraud, and was invalid as between Harkness and the defendant. The plaintiff claimed to recover as a *bona fide* purchaser for value without notice of the fraud.

The court failed to find that the plaintiff, as a careful and prudent concern, had no reason to suspect when it took the check that it was invalid as between the original parties thereto, and rendered judgment for the defendant to recover its costs. To the failure to find that the plaintiff had no reason to suspect that the check was invalid between the original parties, and to the rendition of judgment for the defendant the plaintiff excepted. No other questions are reserved, and these only will be considered.

The check having been obtained by Harkness from the defendant through the fraud of Harkness, it was invalid as between the original parties thereto, and the burden was on the plaintiff to show that it took the check in the usual course of business, for a valuable consideration, without knowledge of facts which impeached its validity as between the original parties, and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties. *Roth* v. *Allen*, 32 Vt. 125; *Gould* v. *Stevens*, 43 Vt. 125; *Savings Bank* v. *National Bank*, 53 Vt. 82; *Bank* v. *Adams*, 70 Vt. 132, 40 Atl. 166; *Bank* v. *Baxter*, 31 Vt. 101.

In *Bromley* v. *Hawley*, 60 Vt. 50, 12 Atl. 222, it is said, that the purchaser of negotiable paper must exercise reasonable prudence and caution in taking it, if the circumstances are such as ought to excite the suspicion of a prudent and careful man as to the validity of the paper as between the parties to it, or the propriety of the transfer, and the purchaser takes it without inquiry, he does not stand in the position of a *bona*

fide holder, but in the position of the party from whom he takes it, though he may have paid value for it.

The question of whether the plaintiff, as a careful and prudent concern had no reason to suspect when it took the check that it was invalid as between the antecedent parties thereto was a question of fact for the determination of the trial court, and that court having failed to find this fact in favor of the plaintiff, the plaintiff failed to establish a fact essential to its right of recovery. In the circumstances shown by the findings, it cannot be said as a matter of law that the plaintiff was not put upon inquiry respecting the validity of the check as betwen the original parties thereto.

It is found, that at the time the plaintiff took the check, its officers knew that Harkness was not responsible and would not loan money upon his credit; that on the 6th day of March, 1903, Harkness procured the check of the defendant and on the same day transferred it to the plaintiff; that on the second day of the same month Harkness had procured a note to be discounted by the plaintiff for three hundred dollars on which the name of the surety and the approval of the plaintiff's president were forged; that on the same day Harkness admitted to the plaintiff's president that he forged the approval and the name of the surety, and asked the president what he was going to do about it, and without telling him, the president asked him what he was going to do about it, and intimated that he had better fix it up, and asked him if he could not pay back the three hundred dollars he had received on the note, and when Harkness paid this note on March 6th, 1903, out of the check in question, the plaintiff's president said to him "go and do so no more." These and other facts and circumstances, which appear in the findings, were for the consideration of the trial court, and its failure to find that the plain-

tiff as a careful and prudent concern had no reason to suspect, when it took the check, that it was invalid as between the original parties thereto will not be reversed in this Court.

The view we have thus taken of the conclusiveness of the findings and failure to find by the court below is sustained by the holdings of this court upon the facts reported in *Roth* v. *Allen, Bank* v. *Adams,* and *Gould* v. *Stevens,* before cited. In *Roth* v. *Allen,* it is said that the question, whether the holder of current negotiable paper has taken it with or without notice of defences between prior parties, whether he has exercised good faith in the transaction, or has been guilty of negligence or want of proper caution, are always questions of fact to be submitted to and determined by the jury. All the circumstances attending the transaction, the condition of the several parties, and all other facts that bear upon such an issue, are only evidence for the jury to weigh in deciding it.

In *Bank* v. *Adams,* this Court in holding that the plaintiff's motion for a verdict was properly denied quoted with approval the rule given in *Roth* v. *Allen.*

The plaintiff insists that it is entitled to a judgment on the facts found and relies upon the case of *Bank* v. *Goss,* 31 Vt. 315, and *Bromley* v. *Hawley,* 60 Vt. 46, 12 Atl. 220. But the facts as reported in those cases are unlike those in the case at bar. In *Bank* v. *Goss,* the defendant Goss procured the defendant Page to sign the note in suit for the purpose of enabling Goss to obtain a loan at the bank in the usual course of business. At the time the note was signed it was agreed by Goss that he would not use it, unless he could also procure the signature of one Brown upon it. Goss in violation of this agreement procured the plaintiff to discount the note, without the signature of Brown. Neither the bank nor any of its officers had any knowledge or notice of the alleged agreement.

In *Bromley* v. *Hawley*, the trial court rendered judgment for the plaintiff, and this Court said that the fact that the note was overdue; that it amounted to four thousand dollars; that it had different numbers on it,—one placed there by the maker and the other by the bank,—were not sufficient to put the plaintiff upon inquiry; it appearing that he took the note in good faith; and that the party with whom he negotiated was a man of extensive business, and his character and financial standing high, and in so doing quoted with approval the rule, herein referred to, respecting the duty of the purchaser of negotiable paper.

In the case at bar, the plaintiff in negotiating for the check was dealing with a party known to it to be irresponsible and a forger. Harkness had only four days before perpetrated a fraud upon the plaintiff by procuring it to discount, as genuine, a note for three hundred dollars on which he had forged the name of the surety, and the approval of the plaintiff's president. Also the plaintiff, in negotiating for the check, was dealing with a party who had before defrauded the plaintiff by procuring it to discount, as genuine, a note for seventeen hundred dollars to which the party had forged the name of a surety appearing thereon, and it is found that, at the time of the transfer of the check, the plaintiff's president had reason to suspect that the name of the surety on this note was forged.

In view of these and other facts and circumstances appearing from the findings, a court might well consider that the plaintiff's officers knew of the fraudulent and dishonest methods resorted to by Harkness to obtain money and credit; that they had reason to suspect that the check was obtained from the defendant by the same methods, and hesitate to find that the plaintiff had no reason to suspect that Harkness had pro-

cured the check from the defendant by fraud. In these circumstances it cannot be said that the equities are with the plaintiff, or that it is entitled to recover the amount of the check notwithstanding the failure of the court to find that it had no reason to suspect, when it took the check, that the same was invalid as between the original parties thereto.

The case of *Ormsbee* v. *Howe,* 54 Vt. 182, was for the benefit of one Healey, who purchased the note before due of one Preston, the payee. The note was given in settlement of a fraudulent debt and was wholly without consideration. The case was tried by the court, and it found that Healey had such knowledge in regard to the way in which orders and notes for wire were obtained by Preston that he might reasonably expect that the note in suit was obtained in the same manner. Notwithstanding this finding, the trial court rendered judgment for the plaintiff to recover on the note, but this Court on the finding reversed the judgment and rendered judgment for the defendant to recover his costs.

Judgment affirmed.

CLARENCE J. HATHAWAY *v.* MITCHELL GOSLANT.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and POWERS, JJ.

Opinion filed January 26, 1905.

Trespass—Cutting Trees—Treble Damages—Pleading—Joinder of Counts—Election—Evidence—Leading Questions—Bill of Exceptions—Referring to Transcript—Effect—Cross-examination—Offer—Declarations of Deceased Persons Respecting Lines—When Admissible.

V. S. 5020, which gives treble damages for cutting trees, creates no right of action, but only gives cumulative damages for what was, and still is, actionable at common law.

In trespass for cutting and drawing away trees, the original declaration declared for treble damages. Before trial the plaintiff, without objection, and without terms being either claimed or imposed, filed a new count for the same acts of the defendant declaring for single damages only. *Held* that the issue on each count was the same; that defendant was not entitled to costs to the time of the filing of the new count, under V. S. 1693; and that the delay of the court till the close of all the evidence before it compelled the plaintiff to elect on which count he would stand could not have been prejudicial to the defendant.

In trespass for cutting and drawing away trees, it was not error—and if error, it was harmless—to allow the plaintiff to testify that, when defendant called upon him for the purpose of fixing the damages, and the plaintiff refused to talk about a settlement, the defendant said to him, "That he had generally found in such cases a man willing to do something, and if I was a gentleman he thought I would;" it appearing that defendant did not except to the admission of the testimony that he called upon the plaintiff for said purpose, but excepted only to the admission of the testimony showing his said comment upon plaintiff's refusal to talk upon the subject.

A ruling of the trial court permitting a leading question is not reviewable, unless it appears from the record that it was ruled, as matter of law, that the question was not leading.

The objection that a question is leading will not be considered in this Court, when the record does not show that objection to have been made in the court below.

When an official transcript of the evidence, so far as it bears upon the admissibility of certain expert testimony, is referred to and made a part of the bill of exceptions, but is not furnished the Supreme Court, that Court cannot say that the witness was not qualified to testify as an expert, or that the court below did not so find.

In trespass for cutting and drawing away trees, a witness for the plaintiff testified, on direct examination, as to the cost of cutting, hauling, sawing, and shipping the lumber from the land in dispute, and that hardwood drawn to the mill in the winter would be stuck up in the spring and remain until August or September. It did not appear that the witness ever saw the lumber or knew anything about its quality. *Held*, it was not error to exclude the question, on cross-examination, whether the hard wood lumber was such as witness would send to market in the form of boards, or whether it was only fit for chair stock, or the question, "Is there a risk during the summer to run of fire?"

In trespass for cutting and drawing away trees, when the plaintiff's evidence tended to show that he was keeping the trees in question to have them grow and finally to cut them into building lumber; that some years before he drew about 20,000 feet of lumber into a certain mill; it was not error to exclude defendant's offer to show that this lumber was still in the mill yard, and to show its condition as to soundness, and that it was got out for building purposes.

To reserve an available exception to the exclusion of testimony from a witness produced by the excepting party, an offer must be made stating what the witness would testify to, and when no offer was made, and the record does not show which party produced the witness, error does not appear.

In trespass for cutting and drawing away trees, when, as bearing on the value of a certain ash tree in question, the defendant's evidence tended to show that the boards that were sawed therefrom were poor boards, and that one Jewett had the boards to bank his house, it was not error to exclude the offer of the defendant

to show by himself, that he did let Jewett have some ash boards to bank his house, the offer not showing that the boards he let Jewett have came from the tree in question, or that he let Jewett have them before the controversy arose.

When a transcript of the evidence is referred to and made part of the bill of exceptions, for the purpose of determining the admissibility of evidence, but is not furnished the Supreme Court, that Court does not have all there is of the bill of exceptions before it.

In trespass for cutting and drawing away trees, plaintiff was allowed, subject to defendant's exception, to show the cost of cutting, hauling, sawing, and shipping to Boston of lumber from the land in controversy. The official transcript of the evidence was referred to and made part of the bill of exceptions to determine the admissibility of this evidence, but was not furnished. *Held*, that error did not appear.

Cross-examination to test the accuracy, veracity, or credibility of a witness, or to shake his credit by impeaching his character, is, to a large extent, within the discretion of the trial court.

In trespass for cutting and drawing away trees, when it appears, from the cross-examination of a witness called by the defendant, that at some time a case was tried in which the defendant and one Lane were parties, it is within the discretion of the trial court, and not an abuse of such discretion, to allow said witness, on further cross-examination, to be asked, "Did you testify in that case to the effect that you were up to see Lane, and that you had some talk with him that you were an important witness in that case, and his paying you if you would be out of the State at the time of the trial?" and to answer, "Yes, I saw Mr. Lane and talked with him relative to that."

The objection, that "the subject matter of the examination, as inquired about, was not admissible," presents no question as to the qualification of the witness to testify about the matter concerning which he is interrogated.

The rule, which allows the declarations of deceased persons in respect of boundaries to be given in evidence, is an exception to the rule which excludes hearsay evidence; and under it, such declarations may be received as evidence, though they are not a part of the *res gestae;* and their admission is not dependent on whether they accompany and give character to some act not affecting the declarant's title.

In an action of trespass for cutting trees involving the location of the boundary of plaintiff's farm, plaintiff was properly allowed to testify that his father told him, in the house on the farm in question, a year or two before he died, that a certain tree, described in the evidence and in the line as claimed by the plaintiff, was a line tree in the line between his land and the disputed territory, it appearing that the declarant was dead, and the plaintiff having previously testified that there never was, to his knowledge, any dispute as to this line up to the time of cutting the timber in question.

In an action of trespass, counsel for plaintiff, in argument to the jury, said, "Remember that this is a game of concealment by the defence." The Court, in allowing an exception, said that counsel "argues that as an inference." No transcript of the evidence having been furnished the Supreme Court. *Held*, that error did not appear; that the testimony may have been such as to justify the inference.

In trespass for cutting and drawing away trees, the defendant excepted to the charge of the court on the subject of exemplary damages, and to the charge on the question of exemplary damages as to the cutting by the defendant of trees between the two lines in dispute. The portion of the charge quoted in the bill of exceptions contained nothing about the trees between the two lines; and defendant's counsel stated in their brief that, "The charge as to exemplary damages was in accordance with the law of this State." No transcript of the evidence was furnished, and the defendant did not except to the refusal of the court to charge as requested, but only to the charge as given. *Held*, that no question as to the charge on the subject of exemplary damages is before this Court, and that the defendant cannot now insist that the question of exemplary damages should not have been submitted to the jury.

TRESPASS for cutting and drawing away trees from plaintiff's land. Plea, the general issue. Trial by jury at the September Term, 1903, Washington County, *Haselton,* J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The evidence on both sides showed that the plaintiff's farm is bounded on the east by the town of Marshfield, on the

south by land of Fred Lamberton, on the north by land of Henry Dow.

The exceptions state that: "There was no controversy regarding any line of the plaintiff's land, or of Dow's, except the line between Dow and the plaintiff. That line was in controversy. The plaintiff claimed that it went northerly of the line claimed by Dow. The points of controversy on the Marshfield town line were six rods apart, between Dow and the plaintiff. The dispute was as to the timber cut between those two lines.

The evidence on both sides tended to show that Dow sold the defendant all the standing timber on a part of his farm. Dow's farm is bounded on the east by Marshfield line, south by plaintiff's farm, and north by Peacham line."

The exceptions state that when the plaintiff's father told him that the ash tree was a line tree, both were in the house on the plaintiff's farm. The plaintiff testified: "The circumstances were these: I was then contemplating building a house; I was walking around through the woods to look to see if I could find any hard wood timber suitable for finishing purposes. I found this tree, remembered it, and I asked father if he would allow me to have it. He asked me to describe the tree and its location, and I did so as well as I could at the time, and told him it was marked—described to him the marks; he then said it was a marked tree between him and Dow, and he did not wish to cut it."

The exceptions further state that: "The evidence of the defendant tended to show that the boards that were sawed from the ash tree in question were poor boards, not suitable for market, and that a man by the name of Jewett had the boards with which to bank up his house, and Jewett knew they were the boards that came from this ash tree. The de-

fendant then offered to show, by himself, that he did, in fact, let Jewett have some ash boards with which to bank his house, which was excluded, and the defendant excepted."

The plaintiff's evidence tended to show that this ash tree was a line tree between Dow and himself, while the defendant's evidence tended to show that it was on Dow's land, a few feet from the line that Dow claimed to.

The larger part of the timber cut by the defendant and for which this suit was brought was conceded to have been cut from the land of the plaintiff.

The evidence of the plaintiff tended to show that ash lumber was worth $40 per thousand.

J. P. Lamson for the defendant.

The testimony of the defendant that he did in fact let Jewett have some ash boards with which to bank his house, should have been admitted. It bore upon the value of the ash tree for the cutting of which the plaintiff was seeking to hold the defendant. Whatever renders a claimed fact probable or improbable is admissible. *Armstrong* v. *Noble,* 55 Vt. 428; *Randall* v. *Preston,* 52 Vt. 198.

F. L. Laird and *H. C. Shurtleff* for the plaintiff.

START, J. The action is for cutting and drawing away trees from the plaintiff's land. The original declaration is for treble damages. Before the trial, the plaintiff filed a new count in trespass for cutting and taking away the trees. At the commencement of the trial the defendant requested the court to direct the plaintiff to elect whether he would go to trial upon the original or upon the new count. The court, in overruling the motion, said that, at the close of the evidence, the motion could be renewed. To this ruling the defendant

excepted. At the close of the evidence, the defendant renewed his motion; and the court held that the plaintiff could not go to the jury upon both counts, and directed him to elect whether he would go to the jury upon the amended or original count. Both counts are for the same acts of the defendant, and it is clear that the delay of the court in directing the plaintiff to elect could not have been prejudicial to the defendant.

After verdict for the plaintiff, the defendant moved that the costs be restricted to the time of the filing of the new count. The original declaration declared in trespass for treble damages, and the new count is the same, except that it does not declare for treble damages. In so far as appears, no objection was made to the filing of this count, and no terms were claimed or imposed for so doing. Both counts are for the same acts of the defendant; and, while the original declaration declared for treble damages, the issue upon which the right of action depended was no different from that made by the new count. *Davis* v. *Cotey,* 70 Vt. 120, 39 Atl. 628. By omitting to declare for treble damages in the new count, recovery upon that count was limited to single damages; but this limitation upon the right of recovery under that count did not, as a matter of legal right, entitle the defendant to terms, or to a restriction of the plaintiff's costs. The statute giving treble damages for cutting trees does not create the right of action, but only gives cumulative damages for what was and still is actionable at common law. *Montgomery* v. *Edwards,* 45 Vt. 78. The original and new counts being for the same acts, it cannot be said that the defendant prevailed upon any issue; therefore, he was not entitled to costs under V. S. 1693.

The defendant called upon the plaintiff for the purpose of fixing the amount of damages, but the plaintiff refused to talk about a settlement and referred the defendant to his counsel. The plaintiff was allowed to testify, subject to the defendant's exception, that, on this occasion, the defendant said to him, "That he had generally found in such cases a man willing to do something, and if I was a gentleman he thought I would." There is nothing in the remark excepted to that in any way reflects upon the defendant, nor does it contain an admission of a liability on his part. The defendant did not except to the admission of the testimony tending to show that he called upon the plaintiff and wanted to fix upon the amount of the damage, but to the admission of testimony showing his comments upon the plaintiff's conduct in refusing to talk with him upon the subject. We think there was nothing in these comments that could prejudice the defendant; that, if there was error in admitting the testimony, the defendant has no reason to complain; and that the error was harmless.

The plaintiff was allowed, subject to the defendant's exception, to testify in regard to the prospective growth of the trees in question, and in view of such growth, as to their value upon the stump. The defendant now insists that the case does not show that the witness had ever had any experience or had made any observations respecting such trees. It is a sufficient answer to this objection to say that the official transcript of the testimony given by the witness upon this subject is referred to and made a part of the bill of exceptions, and that the defendant has not furnished us with this transcript; and we cannot say that the witness was not qualified to testify as an expert upon this subject, nor that the court did not so find. The defendant also insists that the question asked this witness was leading and should have been excluded for this

reason; but it does not appear that he objected to the question on this ground, nor does it appear that the court did not allow the question to be answered as a matter of discretion. Unless it appears that the court below ruled, as a matter of law, that the question was not leading, its ruling is not revisable in this Court.

One Lamberton was called by the plaintiff and testified as to the cost of cutting, hauling, sawing and placing upon the cars at Marshfield the lumber on the land in dispute, and on cross-examination, was asked whether the hard wood lumber in question was such as he would send to market in boards, or whether it was only fit for chair stock. The court excluded the question and the defendant excepted. The question was properly excluded. The witness did not testify as to the quality or value of this or any other lumber; therefore, the inquiry was not proper cross-examination. Also, it does not appear that the witness saw this lumber or knew anything about its quality. This witness also testified that hard wood drawn to the mill in the winter would be stuck up after sledding broke up, toward spring, and there remain until August or September; and, on cross-examination by the defendant, he was asked the following question: "Now is there a risk during that summer to run of fire?" This question was also properly excluded. As before stated, the witness was not examined by the plaintiff respecting the value of this or any other lumber on the stump or in the market; and the inquiry was not proper cross-examination. The plaintiff claimed, and his evidence tended to show, that he was keeping the trees in question to have them grow and finally to cut them into building lumber and build some houses, and that some eight or nine years ago he got some twenty thousand feet of lumber into Lamberton's mill. The defendant offered to show that this

lumber was still in the mill yard, and also offered to show its condition as to soundness, and that it was got out for building purposes. This evidence was properly excluded. The question as to what became of the lumber was immaterial, and was not relevant to any issue in the case.

The evidence tended to show that some of the plaintiff's men told one Lamberton not to tell the defendant's men that they were cutting on the defendant's land; and the defendant offered to show their reason for so doing, but did not accompany his offer with a statement of what their reason was. It does not appear but that this evidence was introduced by the defendant, nor that the witness by whom he sought to show the reason was not called by him. If the witness was produced by the defendant, it was the defendant's duty to state in his offer what the witness would testify to. It not appearing what testimony the witness would have given if he had been allowed to answer, we cannot say that there was error in excluding the offer, nor that its exclusion was in any way prejudicial to the defendant; therefore, error does not appear.

The defendant's evidence tended to show that the ash tree, which was in question, was sawed into boards and used by one Jewett in banking his house; and the defendant offered to show, by himself, that he did let Jewett have some ash boards to bank his house. The offer was excluded. In this there was no error. The defendant did not offer to show, by himself, that the boards he let Jewett have were sawed from the tree in question, nor did he offer to show that he let Jewett have the boards after the tree was cut and before a controversy had arisen respecting it. Without such showing, the offered evidence would not render his claim respecting the value of the tree more probable.

The plaintiff was allowed, subject to the defendant's objection and exception, to show the cost of cutting, hauling, sawing and shipping to Boston lumber from the land in question; also what certain kinds of lumber sold for in Boston. The official transcript of the evidence is referred to and made a part of the bill of exceptions, in so far as it bears upon the admissibility of this evidence, and it has not been furnished. Without a transcript of this evidence, we cannot say that its admission was error. It may have been so connected with other evidence that it was admissible. When a transcript of the evidence is referred to and made a part of the bill of exceptions, for the purpose of determining the admissibility of evidence, and is not furnished, we do not have all there is of the bill of exceptions before us.

One Goslant was called and used as a witness by the defendant, and it appearing from the cross-examination that at some time a case was tried in which the defendant and one Lane were the parties and that Goslant was a witness for the defendant in that case, the following question was asked and answered, against the objection and exception of the defendant: "Q. Did you testify in that case to the effect that you went up to see Lane and that you had some talk with him about—that you were an important witness in that case, and his paying you if you would be out of the state at the time of the trial? A. Yes. I saw Mr. Lane and talked with him relative to that." The court below could, in its discretion, allow the question to be asked and answered; and, it not appearing that there was an abuse of this discretion, its ruling will not be reversed by this Court. In Stephen's Digest of the Law of Evidence, Chase, 2 ed., 320, it is said that, when a witness is cross-examined, he may be asked any question which tends to test his accuracy, veracity, credibility, or to

shake his credit, by injuring his character, and that witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the matter was disgraceful to the witness; but it is submitted that the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify. In *State* v. *Fournier and Cox,* 68 Vt. 270, 35 Atl. 180, it is said: "Much latitude is allowed counsel in cross-examination of witnesses in regard to the facts which bear directly upon their present character and moral principles and therefore essential to the due estimate of their testimony by the jury; questions like whether a witness has been in the state's prison, and similar ones, are often allowed, although collateral to the main issue but relevant to the character of the witness. But such cross-examination is, to a great extent, within the discretion of the trial court, and is for that court to say how far the cross-examination shall proceed."

In *State* v. *Slack and Clough,* 69 Vt. 493, 38 Atl. 313, the court, in holding that the cross-examination of the witness about having been convicted in the Circuit Court did not go beyond permissible bounds, said: "The modern tendency is to greater liberality of cross-examination for the purpose of finding out who and what the witness is."

In *McGovern* v. *Hays and Smith,* 75 Vt. 108, 53 Atl. 328, the court, in holding that the witness, for the purpose of discrediting him as such, might on cross-examination be asked if he had been convicted of selling intoxicating liquor and confined in the house of correction therefor, said: "The question of the reception of such evidence must be determined by the

sound discretion of the trial court, and we are satisfied that there was no abuse of discretion in permitting the examination complained of."

The plaintiff's evidence tended to show that a certain ash tree, which was one in question, was a line tree between his farm and Dow's, while the defendant's evidence tended to show that this tree was on Dow's land, a few feet from the line that Dow claimed to; and that he purchased the tree of Dow. The evidence also tended to show that the plaintiff's father owned the land in question for many years, and until his death in 1886. The plaintiff was called as a witness, and the following questions and answers were admitted, against the objection and exception of the defendant: "Q. Now, speaking about this ash tree, I ask if at some time your father told you that was the line tree between his land and the land which is called the Dow land in this trial? A. Yes, sir. Q. And when was this? A. A year or two before he died in 1886. He died in 1886, and I mean a year or two before that." The plaintiff had previously testified that there never was, to his knowledge, any dispute as to this line up to the time of the cutting of the timber in question in 1901. In the court below, the objection to this evidence was general, and in this Court, the only reasons urged by the defendant why the evidence should have been excluded are, that the first question was leading, and that "the subject-matter of the examination as inquired about was not admissible." It does not appear that the defendant objected to the question because it was leading, nor that the court did not allow the question to be answered as a matter of discretion; and for these reasons the objection that the question was leading is not sustained. The objection, that "the subject-matter of the examination as inquired about was not admissible," presents no question respect-

ing the qualification of the plaintiff's father to speak upon the subject of the line in question; and we have only to consider whether the subject-matter was a proper subject of inquiry. The admissibility of declarations to show boundaries has been considered by this Court in several reported cases, and while the holdings have not been entirely uniform, as will be seen from an examination of the cases of *Wood* v. *Willard,* 36 Vt. 82; *Turner Falls Lumber Co.* v. *Burns,* 71 Vt. 354, 45 Atl. 896; *Evarts* v. *Young,* 52 Vt. 329; *Childs* v. *Kingsbury,* 46 Vt. 47, and *Powers* v. *Sibley,* 41 Vt. 288, we think the better reasoning is found in those cases where it is held that declarations similar to those in question are admissible; and we hold that the questions which were objected to related to a proper subject of inquiry. In *Wood* v. *Willard,* 37 Vt. 377, it is held, that the declarations of deceased persons who had actual knowledge as to the location of a disputed boundary, or who, from their connection with the property itself, or their situation and experience in regard to such boundaries and the surveys thereof, had peculiar means of knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon or in the immediate vicinity of the boundary referred to, and pointing it out, are admissible evidence as to the location of such boundary, when, from lapse of time, there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject. But this rule has been somewhat modified by subsequent holdings. Thus, in *Powers* v. *Sibley,* before cited, it is held, that it is not necessary that the declarant be upon or in the immediate vicinity of the boundary in dispute, and pointing it out, in order to make his declaration admissible. In this case the declaration was held admissible, notwithstanding it did not accompany and give character to any act affecting the

declarant's title. In *Childs* v. *Kingsbury* and *Turner Falls Lumber Co.* v. *Burns,* before cited, it is held, that the rule that the declarant must have no interest to misrepresent does not require that he be wholly disinterested in the subject. In both of these cases it is held, that the fact that the declarant is the owner of the land at the time the declaration is made does not show that he is interested to misrepresent; and that declarations made by such owners of land, who have since deceased, are admissible. In *Wood* v. *Willard,* 36 Vt. 82, it is said, that there are cases where a party may prove his own declarations, or those of a former owner, in his own chain of title, where they accompany an act, or a possession, as giving it explanation and character; and in *Evarts* v. *Young,* before cited, it is said that a party is not allowed to show his own declarations, or the declarations of those through whom he claims title, in his own favor, unless such declarations accompany and give character to some act affecting his title, and so become a part of the *res gestae.* The rule thus stated is a rule of general application, and allows declarations to be shown when they accompany and give character to acts, as a part of the *res gestae,* when the act itself is admissible as evidence; and declarations respecting boundaries may be made under circumstances that bring them within this rule, but their admission is not controlled by it. The rule which permits a party to show the declarations of a person who has deceased, respecting boundaries, is an exception to the rule that excludes hearsay evidence; and under it, such declarations may be received as evidence, notwithstanding they are not a part of the *res gestae,* and their admission is not dependent on whether they accompany and give character to some act affecting the declarant's title. *Wood* v. *Willard,* 37 Vt. 377.

Mr. Shurtleff, counsel for the plaintiff, in argument, said to the jury: "Remember that this is a game of concealment

by the defence." The court, in allowing an exception, said: "Mr. Shurtleff argues that as an inference." The testimony may have been such as to justify the inference. We have not been furnished with a transcript of the evidence, and cannot say that it did not tend to show all that was claimed by the counsel. If it did, the argument was proper; if it did not, it was incumbent upon the excepting party to show in some way that the evidence did not justify the inference. In the absence of such showing, it will not be presumed, for the purpose of finding error, that the evidence did not tend to show the concealment claimed by counsel.

The defendant excepted to the charge of the court upon the subject of exemplary damages, and to the charge on the question of exemplary damages as to the cutting by the defendant of trees between the two lines. The charge upon this subject is quoted in the bill of exceptions, and it appears therefrom that the court said nothing about the trees between the two lines; and the defendant's counsel state in their brief that, "The charge as to exemplary damages was in accordance with the law of this State." The defendant did not except to the refusal of the court to charge as requested, nor to its omission to give other or further instructions. He only excepted to the charge as given; and it being conceded by the defendant that the charge as given was correct, no question respecting the charge upon this subject is before us. But the defendant now insists that the case was not one where exemplary damages could be recovered, and that the question of exemplary damages should not have been submitted to the jury. It does not appear that this question was raised in the court below; but, if it was, we cannot, without a transcript of the evidence, say that it was not correctly ruled upon by the court below. The bill of exceptions, after reciting what the

defendant's evidence tended to show respecting the cutting of trees and the circumstances of the cutting, states that the plaintiff's evidence was in some respects contradictory of this; and the official transcript of the evidence on these points is referred to, and is to control. We have not been furnished with a transcript of the evidence thus referred to; and, if the question of exemplary damages was properly before us, we could not, without this transcript, say that the case was not one where exemplary damages could, in the discretion of the jury, be awarded.

Judgment affirmed.

STATE *v.* GEORGE ATKINS.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 26, 1905.

Criminal Law—Breach of the Peace—By Assault—Evidence—Threats—Of Respondent—Of Prosecuting Witness.

In a prosecution for a breach of the peace by intentionally driving a wagon against the carriage in which a woman was riding, whereby she was thrown out and injured, threats made by the respondent, prior to the collision, to the effect that he would some day run into her, are admissible against him.

In a prosecution for a breach of the peace by intentionally driving a wagon against the carriage in which a woman was riding, whereby she was thrown out and injured, when she testifies in behalf of the State, and the respondent's evidence tends to show that she

intentionally ran her carriage against respondent's wagon in order to injure him, it is error for the court to exclude evidence of threats of violence made by her against him before the collision. In such case evidence of prior threats of the prosecuting witness against the respondent are admissible, both as evidence in chief, and as affecting the credibility of said witness.

INFORMATION for breach of the peace. Plea, not guilty. Trial by jury at the March Term, 1904, Washington County, *Stafford,* J., presiding. Verdict, guilty; judgment and sentence thereon.

The respondent excepted.

The evidence of threats which the respondent offered to show were made by the prosecuting witness, were all made before the collision.

By one witness respondent offered to show that the prosecuting witness said: "I keep that (referring to a revolver in her hand) for old George Atkins, and he will get the contents of it;" by another witness, that when the prosecuting witness was asked what she had a certain club for, she replied, "I have got that club to beat George Atkins' brains out, if he tries to run into me;" and by another witness, that the prosecuting witness said: "And your friend Atkins is coming. Yes, he is coming, and if I could have got by him, I would have driven through him."

Gordon & Jackson, and *T. R. Gordon* for the respondent.

The evidence of the threats of the prosecuting witness should have been received. Whart. Cr. L. § 642; *Stokes* v. *People,* 53 N. Y. 164; *State* v. *Turpin,* 77 N. C. 473; *Murphy* v. *Dart,* 42 How. 31; *Campbell* v. *People,* 16 Ill. 17; *People* v. *Scoggins,* 37 Cal. 696-704; *Holler* v. *State,* 37 Ind. 57; *State* v. *Harrod,* 102 Mo. 590, 609.

John H. Senter, State's Attorney, for the State.

Evidence of the threats of the prosecuting witness is inadmissible. *State* v. *Skidmore,* 87 N. C. 512; Whart. Cr. L. § 757.

WATSON, J. The respondent was tried for a breach of the peace and found guilty. The breach of the peace claimed by the State was that the respondent intentionally drove his wagon against the carriage in which Mrs. Hattie Matthews, the prosecuting witness, was riding in the public highway, whereby she was thrown out and injured. The respondent's evidence tended to show that Mrs. Matthews was responsible for the collision, and that she intentionally ran against the respondent's wagon to do him injury, or that on account of the conduct of her horse, and her fast and careless way of driving it, she ran into the respondent's wagon, and that he was not in any way guilty of the offence charged. The respondent claimed that as far as he was concerned the collision was a pure accident, and he disclaimed having acted in self-defence.

The State was permitted to show, subject to exception, that the respondent on an occasion when he was passing Mrs. Matthews prior to the time of the alleged offence, made a threat against her to the effect that he would some day run into her. This evidence was properly received. Prior threats of an accused are relevant as showing his mental attitude toward the prosecuting witness at the time of the assault, unless after the making of the threats and before the assault, the parties become friends. *State* v. *Heun,* 39 Minn. 476; *La Beau* v. *People,* 34 N. Y. 223. Such threats are also evidence tending to make it more probable that the accused committed the act complained of. Whart. Cr. Ev. § 756; *Stokes*

v. *People,* 53 N. Y. 164; *State* v. *Bradley,* 64 Vt. 466, 24 Atl. 1053.

The respondent offered evidence of threats of violence made against him by the prosecuting witness on several different occasions previous to the collision, as showing her animosity toward him, and as tending to show that she was the aggressor, and also that she intended to run into him. This evidence was excluded, to which respondent excepted. When the respondent's evidence tends to show that the prosecuting witness was the sole aggressor, evidence of such threats is admissible upon the same principles and for the same purposes as above indicated regarding threats made by the respondent, and its exclusion was error. *Stokes* v. *People,* before cited; *Leverich* v. *State,* 105 Ind. 277; Whart. Cr. Ev. § 757. The evidence was also legitimate as affecting the credibility of the witness. *Pierce* v. *Gilson,* 9 Vt. 216; *State* v. *Goodrich,* 19 Vt. 116.

Judgment and sentence of the county court reversed, and cause remanded for a new trial.

GEORGE L. JOHNSON *v.* W. W. CATE.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, and WATSON, JJ.

Opinion filed January 23, 1905.

Principal and Agent—Payment by Agent—Voluntary Payment—Money Obtained by Fraud—Recovery—Common Money Counts—Charge of Court.

When one sells goods to another whom he knows to be acting in the transaction as the agent of a known principal, the principal, and not the agent, is the purchaser.

When money has been obtained by one person from another by fraud and without consideration, it may be recovered under the common count for money had and received.

In assumpsit to recover money received by the defendant as the purchase price of goods bought for a known firm by the plaintiff from the defendant, and which money the plaintiff paid the defendant, relying upon his false representation that said firm had not paid him for said goods, when the defendant admitted, at the trial, that, if the goods were properly chargeable by him against said firm in the first instance, then the firm had paid him therefor before he obtained plaintiff's said money, and it appeared that the plaintiff, in making said purchase, was acting as the agent of a known firm, and that the defendant then knew this. *Held*, that said firm, and not the plaintiff, was the purchaser of said goods; that the plaintiff's requests to charge, based upon the theory that the jury were to find, as a fact, whether said firm was the purchaser, were properly denied; that the question of voluntary payment is not involved in the case; and that whether the items of said purchase appear on the books of said firm is immaterial to the defendant's interests.

In such case, because it appears of record that defendant obtained plaintiff's money by fraud and without consideration, plaintiff was entitled to have the jury instructed, in compliance with his request, that it was immaterial whether he guaranteed the payment for said goods, though his evidence tended to show that he did so.

In such case, when the plaintiff introduced in evidence a paper in the form of a receipted bill from defendant to said firm for "merchandise, the payment of which was guaranteed by" the plaintiff, and containing the items of the goods purchased by plaintiff from defendant for said firm, and which it appeared defendant executed and delivered to the plaintiff at the time the former obtained the money in question, but the evidence was conflicting as to what was then said by the parties as to the purpose of said paper, it was not error for the court to refuse to call the jury's special attention to the tendency thereof, though requested by the plaintiff to do so.

GENERAL ASSUMPSIT, common money counts, for money claimed to have been obtained by fraud. Plea, the general issue. Trial by jury at the December Term, 1903, Caledonia

County, *Haselton,* J., presiding. Verdict and judgment for the defendant. The plaintiff excepted. This case has been once before in the Supreme Court. See 75 Vt. 100.

The plaintiff's third, fifth, seventh, eighth, ninth, and tenth requests to charge, were as follows:

"Third: If the transaction was as stated by Mr. Cate with reference to the lumber, that he simply sold him the lumber, in view of the admissions made by Mr. Cate with reference to his knowledge of the agency of the plaintiff, the sale must be taken to have been to Gray, Howe & Stebbins, and not to Mr. Johnson."

"Fifth: If you find that the lumber and saw were purchased for Gray, Howe & Stebbins, so that it was their duty in the first instance to pay for them, the plaintiff is entitled to recover, if you find the defendant made the representations as claimed by the plaintiff and the money paid in reliance thereon."

"Seventh: If, in the performance of his duty, the plaintiff should have notified Gray, Howe & Stebbins, or Gray & Howe, of this transaction, and did not do so, that fact cannot advantage the defendant in this proceeding, if the purchase of the logs and saw were by Gray, Howe & Stebbins, and not a purchase for himself by the plaintiff."

"Eighth: Inasmuch as the settlement between Gray & Howe, and Gray, Howe and Stebbins and the defendant was a jump settlement, it is entirely immaterial, in any view of the case, whether these items or transactions appear on the books of Gray, Howe & Stebbins or not."

"Ninth: It is not necessary for the plaintiff to establish that he originally guaranteed the payment for either the logs or the saw. If the defendant falsely told the plaintiff that the purchase price of the logs and the saw, or either of them, was

still due the defendant when the price had in fact been paid to the defendant, by settlement or otherwise, the plaintiff is entitled to recover."

"Tenth: The paper marked 'Plaintiff's Ex. A.' is an important piece of evidence. You are entitled to use it for two purposes. First, it tends to impeach the defendant in respect of his claim that he never sold the goods to Gray, Howe & Stebbins, and further to impeach his testimony with reference to his present claim that the plaintiff had not before that time guaranteed to the defendant the price of the lumber and saw; beyond that, it is a piece of direct evidence tending in and of itself to affirmatively show that the facts are as stated herein, and as claimed by the plaintiff in this suit."

"Plaintiff's Ex. A." is as follows:

"Gray, Howe & Stebbins to W. W. Cate, Dr.

Merchandise, the pay for which was guaranteed by George L. Johnson.

1891	21,732 ft. Hemlock $4	$ 86	92
	9,701 " Spruce $6	58	20
	178 " Hardwood $6	1	06
	(Logs delivered at Stowe mill)		
	1 Circular Saw	60	00
		$206	18
	Interest to 12-16-96	61	85

Paid by settlement with George L. Johnson, 12-16-96.

W. W. Cate."

Dunnett & Slack for the plaintiff.

May & Hill for the defendant.

This was a voluntary payment, and plaintiff cannot recover. *Bryant* v. *Clark,* 45 Vt. 483; *Gilson* v. *Bingham,* 43 Vt. 410; *Gillett* v. *Brewster,* 62 Vt. 312.

The whole trial proceeded upon the theory that plaintiff claimed to be guarantor of the debt in question. Having made that a determining issue in the case, he cannot now be heard to say that such guaranty is immaterial. *State* v. *Slack,* 69 Vt. 486; *Stone* v. *Tupper,* 58 Vt. 409; *McMullan* v. *Erwin,* 71 Vt. 325; *Durfey* v. *Worcester,* 63 Vt. 418; *Johnson* v. *Cate,* 75 Vt. 100.

The Court properly denied plaintiff's tenth request. Ex. A. was before the jury. *Ashley* v. *Hendee,* 56 Vt. 209; *Read* v. *Read,* 56 Vt. 492; *Dudley* v. *Stevens,* 56 Vt. 158; *Boyden* v. *R. R. Co.,* 72 Vt. 89; *Gregg* v. *Willis,* 71 Vt. 313.

WATSON, J. This action is general assumpsit. The plaintiff seeks to recover $268.03, which he paid to the defendant on December 16, 1896. The plaintiff claims to recover on the ground that the money was obtained of him by the false and fraudulent representations then made to him by the defendant.

In the years 1891 and 1892 the plaintiff was agent for Gray, Howe & Stebbins, a commission lumber firm of Boston. This firm furnished, through the plaintiff, certain money to the defendant to stock his mill in Wolcott Village, and another mill in North Wolcott Village; the purchases for the defendant were either made or approved by the plaintiff; and generally he paid the bills directly to the parties of whom the purchases were made; but some money was furnished to the defendant to hire help, furnish machinery, tools, etc. The money so advanced by the firm, through the plaintiff to the defendant, was credited on the books of the firm to the plaintiff, and was to be charged to the defendant in settlement.

The defendant had the benefit of the entire proceeds of the lumber handled by him and sold by the firm. The items in dispute in this case were made up of some hemlock, spruce, and hardwood lumber, purchased by the plaintiff of the defendant in the course of these transactions, aggregating in value $146.18, and a circular saw for the North Wolcott mill, $60. These two items with interest to the 16th day of December, 1896, make the sum which the plaintiff claims was fraudulently obtained of him by the defendant on the day last named. The lumber composing the above item was sold and delivered at a mill operated by Gray, Howe & Stebbins in Stowe. The defendant had nothing to do with the operation of that mill. The saw was purchased for the mill at North Wolcott. This was one of the mills that was stocked by the defendant with the assistance of the plaintiff, and the lumber therefrom was all shipped by the defendant to Gray, Howe & Stebbins. The defendant admitted in the trial that he knew of the plaintiff's agency for that firm in connection with all of the business above mentioned, that is, he knew that the plaintiff was acting as agent for that firm, and did not know of any business that he was transacting for himself in those localities. The defence was that the goods were sold directly tc the plaintiff, and not to Gray, Howe & Stebbins. The defendant also admitted that if the goods were properly chargeable by him to the firm in the first instance, then he had had his pay; and he only testified with reference to the lumber and saw that he sold them to the plaintiff. He did not testify that the name of Gray, Howe & Stebbins was mentioned in the transaction.

The plaintiff's evidence tended to show that he purchased both the lumber and the saw for the firm, but that he told the defendant at the time of the purchases that he would see that the defendant got his pay for them.

Thus the record shows that in the purchase of the lumber and the saw in question the plaintiff was acting as the agent of Gray, Howe & Stebbins, and that the defendant then knew it. In law the known principal and not the agent is the purchaser. Hence the plaintiff's third request should have been complied with.

Since upon the evidence and the defendant's admissions, Gray, Howe & Stebbins were the purchasers as a matter of law, the plaintiff's fifth and seventh requests were properly refused; for they were based upon the supposition that the jury were to find as a fact whether they were the purchasers or not.

It was proved that all matters between Gray, Howe & Stebbins and the defendant were closed by a "jump" settlement made in November, 1895. The defendant showed by Mr. Stebbins, a member of the firm, that there was no mention of these items respecting the saw and the lumber on the current books of the firm, so far as he had been able to determine by examination. But inasmuch as the defendant knew the plaintiff purchased this property for that firm as his principal, it was immaterial to the defendant's interests in this case whether these items or transactions appeared on the firm's books or not. Under these circumstances the plaintiff was entitled to a compliance with his eighth request.

Since the record shows not only that the defendant had knowledge of the plaintiff's agency in the transactions relating to the saw and to the lumber, and consequently knew that Gray, Howe & Stebbins were the purchasers of the property, but also that he was paid by the firm before he obtained of the plaintiff the money here sought to be recovered, the question of voluntary payment is not involved. The plaintiff's evidence tended to show that notwithstanding the defendant had been fully paid for the property, he then told the plaintiff that the firm had never paid for the saw or the lumber. And as

regards the lumber, the defendant admitted that he so stated. The plaintiff had no knowledge to the contrary, and relying upon the defendant's representations in this regard, paid him the money. Instead of there being a debt against Gray, Howe & Stebbins voluntarily paid by the plaintiff, it appears by the record that the defendant obtained the plaintiff's money by fraud and without consideration. Under these circumstances it makes no difference whether the plaintiff guaranteed the payment for the lumber and the saw or not, hence he was entitled to a charge in compliance with his ninth request. When money has been obtained by one person from another by fraud and without consideration, it may be recovered back under the common count for money had and received. 2 Greenl. Ev. § § 120, 122; *Cory* v. *Freeholders of Somerset,* 47 N. J. L. 181; *Burton* v. *Driggs,* 20 Wall. 125, 22 L. Ed. 299.

At the time the money in question was obtained by the defendant he executed the paper marked "Plaintiff's Ex. A" and delivered the same to the plaintiff. It is in form a receipted bill from himself to Gray, Howe & Stebbins for "merchandise, the pay of which is guaranteed by George L. Johnson" (the plaintiff), then giving the items for the lumber and the saw, with interest added to December 16, 1896. It further shows that the bill was "paid by settlement with George L. Johnson" on the day last named. The evidence was somewhat conflicting as to just what was said by the plaintiff and the defendant concerning the purpose of this paper at the time it was executed. At most it was but a piece of evidence to be considered with the other evidence and the admissions in the case. There was nothing about it which required the court to call the jury's special attention thereto, and to ignore the plaintiff's tenth request was not error.

Judgment reversed and cause remanded.

POWERS, J., having been of counsel, did not sit.

IN RE LOUIS E. PETERSON.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 26, 1905.

Habeas Corpus — Imprisonment — Trover — Judgment for Damages—Certified Execution—Necessary Implication—Discharge in Bankruptcy—Effect on Provable Debt—Burden of Proof.

A judgment for damages in an action of trover does not necessarily imply that the defendant therein obtained property by false pretences or false representations.

When, on Habeas Corpus, the imprisonment of the relator is justified solely by virtue of a certified execution issued on a judgment against him, the burden is on the judgment creditor to show that said judgment is a liability of a class not affected by a discharge in bankruptcy which was granted the relator, as the result of proceedings under the U. S. Bankruptcy Act, wherein said judgment liability was a provable debt.

On Habeas Corpus, the imprisonment of the relator was justified solely by virtue of a certified execution issued on a judgment against him in an action of trover. Nothing appeared of record to characterize the conversion on which that action was based, beyond what might be inferred from the certificate on the execution showing the judgment of the court that the cause of action "arose from the wilful and malicious act or neglect" of the relator. It appeared that the relator had been granted a discharge in bankruptcy, as the result of proceedings under the U. S. Bankruptcy

Act wherein said judgment liability was a provable debt. *Held*, that the record failed to show that, under said Bankruptcy Act, said judgment debt is a liability of a class not affected by said discharge; and the relator is, therefore, unlawfully imprisoned, and is discharged.

HABEAS CORPUS returnable at Burlington in Chittenden County before *Haselton*, J., and duly adjourned into the Supreme Court at its May Term, 1904; argued at that term; re-argued at the October Term, 1904. The opinion states the facts.

H. S. Peck and *W. L. Burnap* for the relator.

The judgment was in an action of trover. The gist of this action is conversion. Conversion is not one of the exceptions mentioned in § 17 of the U. S. Bankruptcy Act, 1898, as amended by the Act of Feb. 5, 1903. Conversion is not a fraud under that Act. Conversion is not obtaining goods by false pretences or false representations. It is held to be a breach of contract and not a violation of a trust. *Hannequin* v. *Clews*, 111 U. S. 676; *In Re Rhutassel*, 2 Am. B. Rep. 697; *Waterman Carriage Co.* v. *Hall*, 7 Am. B. Rep. 716; *In Re John H. Benedict*, 8 Am. B. Rep. 463; *Crosby* v. *Miller, Vaughn & Co.*, 25 R. I. 172.

Powell & Powell for Gosselin & Bro., judgment creditors.

This judgment was for obtaining property under false pretences, and so is within the exception of § 17 of the U. S. Bankruptcy Act. The Court may go behind the judgment to ascertain the real nature of the liability. *In Re Leahey*, 58 Vt. 724; *Paterson* v. *Smith*, 72 Vt. 288; *In Re Bullis*, 7 Am. B. Rep. 238; *In Re Rhutassel*, 2 Am. B. Rep. 697; *Packer* v. *Whittier*, 1 Am. B. Rep. 621; 5 Cyc. 402-3, Note 2 and cases cited.

"No purely technical considerations as to the precise form of the action should be regarded." *In Re Lewissohn*, 3 Am. B. Rep. 594.

WATSON, J. On September 11, 1903, judgment was rendered by the county court against the relator in an action of trover for the sum of $828.71 damages and costs, in favor of Eugene Gosselin and A. P. Gosselin, co-partners. At the time of rendering this judgment the court considered, ordered, and adjudged that the cause of action arose from the wilful and malicious act or neglect of the relator, and that he ought to be confined in close jail, a certificate whereof was stated upon the alias execution issued upon said judgment as hereinafter stated. See V. S. 1751. The relator was adjudged a bankrupt by the bankruptcy court February 16, 1904, on his own petition dated the preceding day. February 19th he was arrested on a close jail execution issued on the above named judgment and committed to the county jail. Three days later he was released from jail by order of the court of bankruptcy pending the proceedings therein. On April 16th he was granted a discharge in bankruptcy, releasing him from all of his provable debts, except such as were not affected thereby under the provisions of section 17 of the Bankruptcy Act of 1898 as amended by the Act of 1903. April 12th,—four days before the discharge was granted,—the relator was arrested on an alias execution issued on the same judgment in favor of the Gosselins, and again committed to the county jail, and it is from this imprisonment that he seeks a release by these proceedings.

One ground upon which the relator claims the right to such release is that his discharge in bankruptcy released him from the liability evidenced by the judgment rendered in the action of trover. No claim is made but that the conversion be-

came a fixed liability by the judgment, and that as such it was a provable debt under the bankrupt law. But the judgment creditors contend that this liability comes within clause (2) of section 17a of that law, and that therefore it is not affected by the discharge. By that section a discharge releases a bankrupt from all of his provable debts, except such as (2) are liabilities for obtaining property by false pretences or false representations, etc.

A judgment for damages in an action of trover does not in itself carry with it the implication of obtaining property by false pretences or false representations. Indeed, it does not necessarily even import an acquisition of property, for wrongful detention after one has become lawfully possessed of property in the first instance, may constitute a conversion. There is nothing before us which characterizes the conversion in question in this regard, beyond what may be inferred from the certificate on the alias execution showing the judgment of the court that the cause of action "arose from the wilful and malicious act or neglect" of the relator, and of this the legal effect most favorable to the relator must be given, for the burden is on the judgment creditors to show that their debt is within one of the classes not affected by the discharge. *Bailey's Admx.* v. *Gleason*, 76 Vt. 115, 56 Atl. 537. Thus construing it, the record falls short of showing that the property converted was obtained by false pretences or false representations. Such an adjudication may be made in an action of trover where the lawful possession of the property is in the one who converts it to his own use by an unauthorized sale, while the general or a special ownership is in another. See *Watson* v. *Goodno*, 66 Vt. 229, 28 Atl. 987.

Since it does not appear that the debt is a liability of an excepted class, the relator was released therefrom by his discharge in bankruptcy.

It is adjudged that the relator is unlawfully imprisoned, and he is discharged.

GEORGE B. DEE *v.* FRANCIS KING.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 26, 1905.

Easements—Right of Way—Quasi Easements—Deeds—Exception and Reservation Distinguished—Witness—Incompetency—Waiver.

In a suit in chancery involving the existence of a right of way, when the orator called and used the defendant as a witness to show that orator's father passed through and over the land in question, his habit and custom in so doing, to what extent, under what circumstances, and for what purpose, the orator thereby waived his right to object to the defendant on the ground of incompetency, when subsequently called in his own behalf.

Although the strict office of an exception in a deed is to exempt from the operation thereof something in *esse* and part of the thing granted, while a reservation creates in favor of the grantor some new right out of the thing granted and which was not before in *esse*, yet, in construing deeds, these terms are often treated as synonymous, and a clause intended to create an exception will have that effect though the word "reservation" is used.

Beside technical easements, there are "*quasi* easements," such as a visible and reasonably necessary drain or way used by the owner of land over one portion thereof, to the convenient enjoyment of another portion, though there has never been any separate ownership of the *quasi* dominant and the *quasi* servient tenements.

Though the owner in fee of land cannot have a technical easement therein, he may have a *quasi* easement over one portion thereof in the nature of a visible, travelled way reasonably necessary

to the convenient enjoyment of another portion; and in conveying the land over which such way is, such owner may treat the way as a thing in being and part of the estate granted, and may except it from the operation of the deed.

Technical words of limitation are not applicable to an exception, for the part excepted remains in the grantor as of his former title.

If, while over one portion of his farm there is a visible, travelled way which is reasonably necessary to the convenient enjoyment of another portion thereof, the owner conveys that portion over which such way is, and in the deed, immediately following the description of the land conveyed, is the clause, "reserving the privilege of a pass from the highway past the house to the railroad, in my usual place of crossing," that clause must be construed, not as a reservation, but as an exception, and the way then retained became an easement over the land conveyed and appurtenant to the other land, and with the latter it would pass by descent, or by conveyance.

A right of way appurtenant to land attaches to every part of it, though the land may go into the possession of several persons.

APPEAL IN CHANCERY. Heard on master's report and exceptions thereto at the March Term, 1904, Franklin County, *Start*, Chancellor. Decree dismissing bill. The orator appealed.

This case has been once before in the Supreme Court, and the decree was reversed *pro forma* for the reason stated in the opinion in this case. See 73 Vt. 375, for further statement of the facts involved.

H. P. Dee, and *Farrington & Post* for the orators.

George W. Burleson, and *Alfred A. Hall* for the defendant.

WATSON, J. When this case was here before (73 Vt. 375) the decree was reversed *pro forma* and the cause remanded for additional findings of fact by the special master, as to the time when, with reference to March 16, 1882, Jared

Dee asked and obtained permission of the defendant to cross his three-acre piece of land on the east side of the Central Vermont Railroad. On the hearing before the master for this purpose, the orator introduced no further evidence. The defendant testified in his own behalf, and from his testimony the fact is found that Jared Dee first asked and obtained of the defendant permission to cross that land in January, 1882. The orator seasonably objected and excepted to the defendant's testifying to any conversation had between him and Jared Dee on this point, because Jared Dee was dead.

The defendant was called and used as a witness by the orator at the first hearing, upon the question, among other things, whether Jared Dee passed through and over the three-acre piece, his habit and custom in so doing, to what extent, under what circumstances, and for what purpose. The orator made the defendant a general witness upon that question, and he thereby waived the statutory incompetency of the defendant as a witness,—*Paine* v. *McDowell*, 71 Vt. 28, 41 Atl. 1042; *Ainsworth* v. *Stone*, 73 Vt. 101, 50 Atl. 805,—and he could not afterwards complain because the defendant gave testimony in his own behalf more fully upon the same subject matter.

Jared Dee having obtained permission of the defendant to cross the three-acre piece within fifteen years next after March 16, 1867, the orator can have no prescriptive way over it. A right of way over this land is neither set forth nor claimed by the orator in his bill; yet in one aspect of the case whether he has such a way is material.

The only right of way claimed by the orator over the defendant's land so far as appears by the bill, is over the one-half-acre piece on the west side of the Central Vermont Railroad, as reserved by Jared Dee in his deed dated October 7, 1862, conveying that land to William W. Pettingill. In that deed

immediately following the description of the land conveyed is the clause "reserving the privilege of a pass from the highway past the house to the railroad in my usual place of crossing." The defendant contends that these words are only a reservation of a personal privilege to Jared Dee which could not pass to his heirs or assigns because no words of inheritance or assignment were used in connection therewith; while the orator contends that the clause has the force of an exception, and that the servient estate thereby created passed to the subsequent owners of the dominant estate without such words of limitation being used. Much depends upon the construction given in this regard, in the disposition of the case. Lord Coke says that "reserving" sometimes has the force of saving or excepting, "so as sometime it serveth to reserve a new thing, viz. a rent, and sometime to except part of the thing in *esse* that is granted." Co. Litt. 143, a. Sheppard says that "a reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the tenendum, * * *. This part of the deed doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before, so that this clause doth always reserve that which was not before, or abridge the tenure of that which was before." Shepp. Touch. 80. Again the same author says, that an exception clause most commonly and properly succeeds the setting down of the things granted; that the thing excepted is exempted and does not pass by the grant. p. 77. The same principles were largely laid down by this Court in *Roberts* v. *Robertson,* 53 Vt. 690. There the deed given by the plaintiff contained a specific description of the land conveyed, and a clause "reserving lots * * * 32,

33," etc. Under this clause the plaintiff claimed title to the two lots above named. The court, after stating the offices of an *exception* and of a *reservation* the same as above, said these terms, as used in deeds, are often treated as synonymous and that words creating an exception are to have that effect, although the word reservation is used. It was held that the clause should be construed as an exception.

In England it has been held that a right of way cannot in strictness be made the subject of either an exception or a reservation; for it is neither parcel of the thing granted, an essential to an exception, nor is it issuing out of the thing granted, an essential to a reservation. *Doe* v. *Lock*, 2 Ad. & E. 705; *Durham, Etc. R. R. Co.* v. *Walker*, 2 Q. B. 945. But there, as in this country, *quasi* easements are recognized in law, such as a visible and reasonably necessary drain or way used by the owner of land over one portion of it to the convenient enjoyment of another portion, and there has never been any separate ownership of the *quasi* dominant and the *quasi* servient tenements. As such easement, a drain is classed as continuous, because it may be used continuously without the intervention of man; and a right of way as non-continuous because to its use the act of man is essential at each time of enjoyment. In *Barnes* v. *Loach* (1879), 4 Q. B. D. 494, it was said regarding such easements of an apparent and continuous character, that if the owner aliens the *quasi* dominant part to one person and the *quasi* servient to another, the respective alienees, in the absence of express stipulation, will take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them. And in *Brown* v. *Alabaster* (1888), 37 Ch. D. 490, it was said that although a right of way by an artificially formed path over one part of the owner's land for the benefit of the other portion, could not be brought within the definition

of a continuous easement, it might be governed by the same rules as are apparent and continuous easements.

Cases involving *quasi* easements have been before this Court. In *Harwood* v. *Benton & Jones*, 32 Vt. 724, the owner of a water privilege, dam, and mill, also owned land surrounding and bordering upon the mill pond and mill, which he subjected to the use and convenience of the mill privilege and mills. A part of these adjacent lands thus subjected was conveyed without any stipulation in the deed that any servient condition attached thereto. The condition of the estate had been continuous, was obvious, and of a character showing that it was designed to continue as it had been. The Court said this was a palpable and impressed condition, made upon the property by the voluntary act of the owner. It was held that without any stipulation in the deed upon that subject, the law was that the grantee took the land purchased by him, in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill. It was there laid down as an unquestioned proposition that "upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements;" and that the doctrine was equally well settled that the law will imply a reservation of like easements in favor of the part of the inheritance retained by the grantor. In *Goodall* v. *Godfrey*, 53 Vt. Vt. 219, a "visible, defined way in use for the obvious convenience of the whole building" was in question, consequent on a division of the property among the representatives of the deceased owner, and the same principles of law were applied. And in *Willey, Admx.* v. *Thwing*, 68 Vt. 128, 34 Atl. 428, applying the same doctrines, a right of way was upheld under an implied reservation.

In this country it is commonly held that a way may be the subject of a reservation, and in many cases courts of high standing have held that it may properly be the subject of an exception in a grant. While it is true that an owner of land cannot have an easement in his own estate in fee, he may as before seen have a *quasi* easement over one portion in the character of a visible, travelled way reasonably necessary to the convenient enjoyment of another portion, and when such a way exists, there would seem to be no substantial legal reason why it may not be treated as a thing in being, and as a part of the estate included in the description of the grant be made an exception in a deed of the land over which the way is, when such appears to have been the intention of the parties. That this is the principle upon which a clause reserving a way is construed as an exception appears from *Chappell* v. *N. Y., N. H., & H. R. R. Co.*, 62 Conn. 195, which is more particularly referred to later. There the Court said: "Then too the right to cross was, in a certain sense, a right existing in the grantors at the date of the deed. It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be, in effect, conferred upon them by the grantees. It was something which the 'reservation' in effect 'excepted' out of the operation of the grant."

The distinction between a reservation and an exception of a way is best understood by an examination of cases involving clauses very similar to the one here under consideration, yet so unlike as to require different constructions in this regard. In *Ashcroft* v. *Eastern R. R. Co.* 126 Mass. 196, 30 Am. Rep. 672, the clause was "reserving to myself the right of passing and re-passing, and repairing my aqueduct logs forever, through a culvert * * * to be built and kept in repair by said company; which culvert shall cross the

railroad at right angles," etc. It was held that the provision that the grantee should build and keep in repair the culvert was an essential part of the grant, and clearly indicated that the intention of the parties was to confer upon the grantor a new right not before vested in him, which, therefore, could not be the subject of an exception. In *Claflin* v. *Boston & Albany R. Co.* 157 Mass. 489, 20 L. R. A. 638, the clause was "reserving to ourselves the right of a passage way to be constructed and kept in repair by ourselves." There was no evidence of an existing way across the land. It was held to be a reservation and not an exception. In *Chappell* v. *N. Y., N. H. & H. R. R. Co.* before cited, John W. and Benjamin F. Brown, in 1851, owned a piece of land in New London fronting on the river Thames and lying between that river and Bank street. On the river front was a wharf and docks. Between the wharf and Bank street was about one and one-half acres of land used by the Browns in carrying on a coal and wharfage business. The wharf was valuable. In that year the Browns conveyed, for railroad purposes, a strip of this land, twenty-five feet wide, running through the land and separating the wharf from the land lying westerly of the strip conveyed, and rendering it inaccessible except by crossing the strip. This right of crossing was indispensable to the Browns and all who might thereafter own the premises then owned by them. The deed thus conveying this strip contained the clause "And we reserve to ourselves the privilege of crossing and re-crossing said piece of land described, or any part thereof within said bounds." The way at the time of the date of the deed was an existing one plainly visible, necessary, and in almost constant use. The clause was construed to be an exception. In *Bridger* v. *Pierson,* 45 N. Y. 601, the defendant conveyed land to the plaintiff and immediately following the description the deed contained the clause "reserving

always a right of way as now used on the west side of the above described premises * * * from the public highway to a piece of land now owned by" R. It was held to be an exception. In *White* v. *N. Y. & N. E. R. R. Co.* 156 Mass. 181, the action was tort for the obstruction of a private way claimed by the plaintiff over the location of the defendant's railroad, under a clause in a deed which read "reserving the passway at grade over said railroad where now made." This way had existed as a defined roadway or cart track, and had been used in passing to and from a highway to and from parts of the lot north of the tracks before the railroad was located, and before the deed referred to was given. The clause was held to be an exception. These are but a few of the many decisions in different jurisdictions which might be referred to upon this question, but more are unnecessary.

The language of the clause under consideration cannot be said to be unequivocal. We therefore look at the surrounding circumstances existing when the deed containing it was made, the situation of the parties, and the subject matter of the instrument; and in the light thereof the clause should be construed according to the intent of the parties. At the time of making this deed Jared Dee was the owner of land on the opposite side of the railroad, consisting of a three-acre piece of tillage land, and a hill lot adjoining it on the north, chiefly valuable for its sugar works, for its pasturage, and as a wood and timber lot. The last named lot is traversed its entire length from north to south and about a third of its width from west to east by a considerable hill, more or less ledgy and making it extremely inconvenient to cross from the grantor's own land north of the Fairbanks land, but easily reached by the now disputed right of way across the one-half-acre piece, and over the three-acre piece of tillage land. The

greater portion of Jared Dee's sugar orchard, timber, and wood was on top and east of this hill. There was no way to or out of the hill lot except over the hill on Jared Dee's own land west of the Fairbanks land, or out through the three-acre piece and the one-half-acre piece onto the public highway leading westerly to Jared Dee's house. For more than ten years next prior to the time when Jared Dee gave the deed to Pettingill, the Dees had passed over the one-half-acre piece and through the three-acre piece almost exclusively for all purposes whenever they went to or from the hill lot, whether with team, on foot, or in any other manner, except when they got wood on the west side of the lot they went from the highway across the Fairbanks farm west of the railroad, thence over the railroad at the "middle crossing" onto the hill lot. And on rare occasions they used still another route further north wholly over Dee's land. It appears from the deed itself that in crossing the one-half-acre piece they had a particular place of travelling then known to both the grantor and the grantee, for the words used in the deed in describing it are "from the highway past the house to the railroad *in my usual place* of crossing." Thus showing the intention of the parties to be that the grantor should retain the right to pass through this land over a visible, travelled way then in existence, and that no new way was thereby being created for his benefit.

Clearly under the law and in the light of the foregoing circumstances, the clause must be construed, not as a reservation, but as an exception. When given this construction, technical words of limitation are not applicable, for the part excepted remained in the grantor as of his former title, because not granted. *Cardigan* v. *Armitage*, 2 Barn. & C. 197; *Chappell* v. *N. Y., N. H. & H. R. R. Co.* before cited; *Winthrop* v. *Fairbanks*, 41 Me. 307. We think the parties in-

tended that by this provision the grantor should permanently retain from the grant for the benefit of his land east of the railroad, the way over the one-half-acre piece, which he had been accustomed to use in crossing that land to and from the land first named. The way, thus retained became an easement over the half-acre piece of land and an appurtenant to the other land; and with the latter it would pass by descent or assignment.

Subsequent to conveying the one-half-acre lot to Pettingill, Jared Dee sold and conveyed the three-acre piece, which through mesne conveyances has become the property of the defendant. But this cannot affect the easement as an appurtenant to the hill lot; for a right of way appurtenant to land attaches to every part of it, even though it may go into the possession of several persons. *Lansing* v. *Wiswall*, 5 Denio, 213; *Underwood* v. *Carney*, 1 Cush. 285.

The master finds that if upon the facts reported the orator has a right of way or a right to cross over defendant's land to the hill lot, then the orator has suffered damage by reason of the acts of the defendant complained of in the bill, to the amount of sixty-five dollars. The orator can recover only such damages as he has suffered by acts of the defendant in obstructing the way across the one-half-acre piece, considering the fact that the orator had no right of way over or right to cross the defendant's three-acre piece. Upon this basis the damages have not been assessed. The report should therefore be recommitted for that purpose, and upon such damages being reported, a decree should be rendered that the injunction be made perpetual, and that the defendant pay to the orator the damages found with costs in this Court. The costs in the court below should be there determined.

The decree dismissing the bill with costs to the defendant is reversed and cause remanded with mandate.

STATE *v.* HENRY M. WHITE.

October Term, 1904.

Present: TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 26, 1905.

Criminal Law—Larceny—Recent Possession—Evidence—Declarations of Respondent.

In a prosecution for stealing a team, the respondent's declaration, that the team was not his own, but was a hired team, made while the property was in his possession, and before he knew that any suspicion attached to him or that any search had been instituted, is admissible in his favor.

INFORMATION for larceny. Plea, not guilty. Trial by jury at the June Term, 1904, Orange County, *Rowell,* J., presiding. Verdict, guilty; and judgment thereon. The respondent excepted.

The opinion states the case.

J. K. Darling for the respondent.

The offered declaration of respondent was admissible. 24 A. & E. Enc. (2 Ed.) 662; Rob. Dig. 285 § 195; *Rudd* v. *Rounds,* 64 Vt. 432; 18 A. & E. Enc. (2 Ed.) 509; *Com.* v. *Rubin,* 165 Mass. 453; *Danforth* v. *Streeter,* 28 Vt. 490; *Reg.* v. *Abraham,* 2 C. & K. 550.

R. M. Harvey for the State.

POWERS, J. The respondent was convicted of the larceny of a team which he had hired at Fairlee, Vt., and which he left at Franklin, N. H., after he had used it a part of the time covered by the contract of bailment. The State claimed that he obtained possession of the property with

felonious intent; this the respondent denied, and he claimed that the hiring and use of the team were *bona fide*. The respondent offered to show that while the property was in his possession at Hill, N. H., and before he knew that any suspicion attached to him or that any search had been instituted, he stated that the team was not his own, but was a hired team. This evidence was rejected, and we are called upon to determine its admissibility.

It is impossible to reconcile the conflicting decisions upon the question here presented. Authorities are not wanting which sustain the action of the trial court in excluding this evidence. Thus in *State* v. *Waters,* 139 Mo. 539, it was held that a respondent charged with stealing a horse, the taking of which he admitted, was not entitled to show that while the horse was in his peaceable possession, he told another that it did not belong to him, the decision being put upon the ground that the statement was too remote in point of time from the original act of taking the horse. To the same effect are *State* v. *Pettis,* 63 Me. 124, and other cases.

On the contrary, Baron ALDERSON charged the jury in *Reg.* v. *Abraham,* 61 E. C. L. 550, that if it had appeared that, before suspicion attached on the prisoner, he had given this account of his possession of the property to his neighbors, the property being there at the time and before search made, he had not the slightest doubt that, *valeat quantum,* this would have been very competent evidence for the prisoner; and this doctrine has been affirmed in several subsequent English cases, and this very language is quoted with approval by Judge TAFT in *State* v. *Daley,* cited below. In *State* v. *Young,* 41 La. Ann. 94, the respondent offered to show that at the time of and prior to her arrest, she showed the article alleged to have been stolen, told to whom it belonged, and that she took it by mistake. The exclusion of this evidence was held to be error.

Smith v. *State,* 103 Ala. 40, is to the same effect, and so are *Payne* v. *State,* 57 Miss. 348, *Com.* v. *Rowe,* 105 Mass. 590, and *Walker* v. *State,* 28 Ga. 254.

Underhill states the rule to be that any declaration made by the accused explaining the reason or character of his possession, if made while it lasts, is admissible as a part of the *res gestae* for or against him. Und. Crim. Ev. § 302. See also II Bish. Crim. Pro. § 746, and III Wig. Ev. § 1781, and n. 4, where the authorities, both English and American, are collected.

The recent possession of stolen property being an incriminating circumstance, it is legitimate for a respondent, in order to repel the presumption of guilt arising therefrom, to show that his possession of the property was open and not secretive,—*State* v. *Fitzgerald,* 72 Vt. 142, 47 Atl. 403,—and his acts and conduct in respect of his possession being admissible, his declarations made at the time, tending to explain or give character to those acts are also admissible. *State* v. *Daley,* 53 Vt. 442. So it is when, as in this case, the vital point is the *intent* with which the respondent obtained possession of the property, his subsequent conduct in respect to his possession thereof is a material fact, and his utterances relative thereto which tend to characterize that possession are admissible in his own behalf.

While we are not required to go to the length of some of the authorities above cited which allow statements as to the manner in which the possession was acquired,—which we reject, *State* v. *Totten,* 72 Vt. 73, 47 Atl. 105,—we think this evidence should have been received.

Other exceptions to the rejection of evidence were taken at the trial, but they are not insisted upon in the respondent's brief, and are not considered.

Exceptions sustained, judgment and sentence vacated, and cause remanded for new trial.

SAMUEL W. HOYT *v.* EDGAR S. HOYT, *et al.*

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 6, 1905.

Trusts—Devise to Support Parents—Breach of Condition—Remedy—Release — Reformation of Instruments — Mistake—Set-off.

When the scrivner who drew a quitclaim deed, and the party who executed it, intended thereby to only effect the assignment of a lease, and the scrivner did not know that the assignor had a claim upon the demised premises for support, which was independent of the lease, and by mistake used words operative to convey all the assignor's interest in the land, such quitclaim deed will be construed to have conveyed only the assignor's interest in the lease intended to be thereby assigned.

A beneficiary under a will, who is entitled to a life support out of property devised to his son, on condition that the latter shall afford him such support, cannot convey away his right of support.

Land was devised to a son on condition that he should support his parents during their lives. The son leased this land to his father, who lived upon it, and assumed to furnish support for himself and his wife, engaging with grocers and others to furnish family supplies, and voluntarily paying therefor, saying nothing to his son upon the subject. During this time the son worked as a hired man upon the property, receiving wages from his father, and pay-

ing or promising to pay his father for his board. *Held*, that the son was released during the continuance of that arrangement, from furnishing the support prescribed by the will.

A son to whom land is devised, on condition that he should support his parents during their lives, holds the estate devised in trust for the life support of his father and mother, though no express trust is created by the will.

When property was devised to a son, on condition that he should support his parents during their lives, and he fails to do so, a bill in equity by the parents to foreclose the son's interest in the property is a proper remedy.

A son, who accepts a devise conditioned on his furnishing support for his parents during their lives, is not relieved from that obligation by the existence of an indebtedness from his father to him, and cannot set off such indebtedness against the amount due from him to his father for such support.

APPEAL IN CHANCERY. Heard on bill, answer, and master's report, at the September Term, 1903, Chittenden County, *Tyler*, Chancellor. Decree, *pro forma*, for the orator. The defendant appealed.

L. F. Wilbur, *H. F. Wolcott* and *Elihu B. Taft* for the orator.

The quitclaim deed was designed to effect a mere assignment of the lease and its effect should be so limited. *Beardsley* v. *Knight*, 10 Vt. 185; *Dietrich* v. *Hutchinson*, 73 Vt. 141; *Adams* v. *Stevens*, 49 Me. 362; *Lockwood* v. *White*, 65 Vt. 466.

W. Y. Leary and *V. A. Bullard* for the defendant.

The lease of the farm by the son to his father merged the trust interest in a new estate. 50 Am. Dec. 183; 91 Ky. 601; 30 Mo. 199; 86 Va. 668.

TYLER, J. The orator brought this bill to foreclose the interest of the defendant Edgar S. Hoyt in a farm in Jericho

by reason of his neglect and refusal to support the orator and his wife, Emily E. Hoyt, and as incident to the foreclosure, to have two written instruments reformed.

The master finds that a Mrs. Borrowdale owned the farm in her life-time, and that by her will, which was duly proved and established in August, 1896, she devised the use of the farm and of the personal property thereon to Edgar during his life, and upon his decease to his heirs, on condition that he should support his father and mother during their lives and the life of the survivor of them, and made such support a charge upon the farm; that the orator in August, 1896, under an arrangement with the executor of Mrs. Borrowdale's will, moved with his family, consisting of his wife, the defendant Edgar, then twenty or twenty-one years of age, and a younger son, from Hillsboro, Wisconsin, to the farm in question and residing there as a family until the next March when the executor turned the farm and personal property over to Edgar; that Edgar carried on the farm till August, 1897, when he leased it to the orator for ten years and received from him $1,326.90 as the rent therefor in advance. The orator had an equitable interest in another farm owned by Mrs. Borrowdale in her life-time in Hillsboro and had made a claim against her estate, to settle which Edgar had given two notes amounting to $1,326.90 which his father surrendered to him for the rent of the Jericho farm. The orator entered into possession of the farm and personal property and in November, 1898, assigned the lease by quit claim deed, through one Gibson, to his wife Emily. The orator and his wife resided upon the farm under the lease until after the wife's death in July, 1900, and thereafter until he was deprived of it in January, 1901, by Edgar, who then turned him out and took possession himself. The orator's reason for assigning the lease to his wife was that he was in poor health,

had fear that he might die suddenly and that by the assignment he thought that his wife would be better protected in respect to her interest in the farm than if he retained it. The assignment was made by a quit claim deed to Gibson, who by a like deed assigned it to Emily, the orator acting for her as her agent in the transaction.

The defendant claims that the orator conveyed his interest in the lease and also his claim upon the land for his support. The master finds that the orator, and Gibson, and Mr. Wilbur who drew the papers, only intended an assignment of the lease, and that Wilbur had no knowledge that the orator had any claim upon the farm for his support nor that he had any right to support under said will; that Wilbur was directed to draw an assignment of the lease and that wholly through his mistake he used words operative to convey all the orator's interest in or claim upon the land.

Upon these findings the quit claim deed must be construed to have conveyed to the orator's wife only a lease-hold interest in the farm. Vt. Dig., page 459, title, Mistake.

By settled rules of law the orator could not have conveyed away his right to support. In *Barnes* v. *Dow*, 59 Vt. 530, 10 Atl. 258, it was held that a beneficiary under a will who is entitled to a life support out of an estate held by a trustee had no power to mortgage the estate; that "there was an unmistakable intention of a permanent indefeasible provision for a life support, and the object of the gift to * * * * was such as to exclude the idea of alienation on her part. A life support must be as lasting and continuing as life." See ~~Pom.~~ Perry on Trusts, 3 Ed. § 386.

The orator was a nephew of Mrs. Borrowdale and has deceased since the hearing before the master; Elihu B. Taft has been appointed administrator of his estate and has entered to prosecute the suit.

The master finds that when the orator and his family moved upon the farm in question he had but little means of support and that Edgar was also without means besides his wages. He boarded in his father's family, worked on the farm and used the products in part payment for his work. The orator and his wife were furnished support to the extent of the produce used by them from the farm. The rest of the support was furnished and paid for by the orator from his pension money and such other money as he possessed.

Upon the orator's request the master found that from August 28, 1896, when the orator moved to this farm, to August 2, 1897, when the lease was executed, a period of forty-eight and three-sevenths weeks, the support of the orator and his wife, as contemplated by the will, was fairly worth six dollars a week, $290.58; that from the latter date to the death of Emily, July 25, 1900, one hundred fifty-four and five-sevenths weeks, such support was worth six dollars a week, $928.30.

After the orator's assignment of the lease to his wife he managed the farm as her agent and provided for her and himself as he had done before, and down to the time of his wife's decease paid Edgar for the work done by him upon the farm.

From his wife's death until he went to Wisconsin, January 18, 1901, a period of twenty-five and two-sevenths weeks, it is found that the orator's support was reasonably worth three dollars a week, in all $75.80; that Edgar worked on the farm the remainder of the season, but for himself during the winter; that he married in August 1897, and resided, with his wife in a house away from the farm while he worked thereon, but that in the winter of 1898 and 1899 they moved to the farm and occupied certain rooms in the house while

the orator occupied other rooms; but they used the kitchen and dining-room in common and all took their meals at one table.

The relations between the orator and Edgar and his wife were very unfriendly after January 5, 1901. Edgar had told his father that he had no right there and had given him notice that he would "sue him out" unless he left the farm before a certain day.

On the orator's return from Wisconsin in April, 1901, he thought it unsafe to return to the farm and boarded at another place paying his board from his pension money. In May of that year he demanded money of Edgar for his support, which the latter refused, but told him he might have his support if he would return to the farm, to which the orator replied that he could not live there and that he wanted his support elsewhere. Edgar said he could not support him elsewhere. The orator then said if Edgar would put in writing that he and his wife would use him well and not kill him he would return. Edgar refused to give such a writing. For this period of sixty-seven and three-sevenths weeks the master finds that the orator's support was worth three dollars a week, $202.29.

It is found that prior to May 30, 1901, the orator made no demand of his son for support; that the latter never offered to furnish it and that there was no waiver of the provision in the will. The master was unable to find, though requested, whether or not the orator expected to be supported by Edgar.

In the years 1897 and 1898 Edgar sold large quantities of timber from the two lots of land that comprise the farm, so that the reversionary estate was injured to the amount of $1,500.00. These sales were mainly made after the lease was assigned by the orator to his wife; the proceeds were applied by Edgar in payment of his wages and in support of

himself and his wife, and it is found that he required all his wages for such support.

The orator claimed a homestead in the leased premises and rental therefor from January 19, 1901, to August 4, 1902, but from the report he had no such interest. The improvements made by him were made voluntarily and without Edgar's request, and for anything that appears, without any expectation by either party that the orator was to receive pay for them. Nor is there any ground for the allowance of the small items claimed, as keeping cows, use of horses, etc.

In the winter of 1897 and 1898 Edgar sold timber from a wood lot belonging to the farm, which the master finds injured the reversionary interest to the amount of $1,000.00; that in the winter of 1901 and 1902 he sold timber from the home farm which injured it to the amount of $500.00, and that Edgar applied the proceeds of this sale in part payment of his wages and to the support of himself and wife.

The defendant presented a claim of $1,500.00 for damages to the farm by the orator's bad husbandry, $400.00 for the defendant's labor, $250.00 for a note and $570.00 for cattle owned by the defendant and sold by the orator. It is found that this claim for damages to the farm was presented by the defendant to the commissioners upon Emily's estate, who allowed $250.00 thereon; that the defendant took no appeal from that judgment, and never made any claim for wages other than what were paid to him until he brought a suit against the orator in January, 1901, in which he recovered a judgment for $45.00, which the master assumes included all his claim for labor to that date. It is also found that the defendant's item for cattle sold was adjusted by the orator's giving him his note for $250.00 secured by a chattel mortgage.

When the orator moved to the farm it was apparently a valuable one but of a kind of soil that required considerable fertilizing. The lease included eighteen cows, all of which were unsuitable for dairy purposes, and the orator disposed of them with Edgar's knowledge, but with an intention to replace them by others according to a requirement in the lease. This however was not done; the hay was sold from the farm, and in November, 1898, the orator settled with the defendant for the cows, and gave him the note and chattel mortgage above mentioned.

The master found that the farm depreciated in value between August, 1897, and January, 1901, to the amount of $1,000.00, caused by selling the crops, a general lack of good husbandry, and from the natural decay of the buildings. He also finds that Edgar worked upon the farm most of the time and knew how it was managed. In 1901 Edgar rented the premises of the administrator of his mother's estate.

The defendant Edgar was about twenty years old when the will was made and proved, and he had no means of supporting his father and mother besides what the farm would furnish, so it is presumable that it was not contemplated by the testatrix that such support should be furnished elsewhere than upon the farm and from its products. From September 2, 1896, when the orator moved to the farm with his family, under an arrangement with the executor, who informed Edgar and his father of the provisions of the will, down to March 14, 1897, when the executor formally turned the farm and personal property over to Edgar, the provisions of the will were evidently carried out. On March 15, 1897, the ten years' lease was executed as a means, as is fairly inferable, though not expressly found, of providing the orator and his wife with support during that period.

The master states that the orator was without means of support to any extent. Yet he had a pension, the amount of which does not appear, and in 1897 he received $1,000.00 from the sale of a half interest in a farm that his daughter had devised to him. Soon after he moved to the farm in question he made arrangements with grocers and others to furnish supplies for his family, and afterwards paid about $500.00 for such supplies and made no request of Edgar either to furnish or pay for them.

During the period in dispute Edgar was a hired man upon the farm most of the time, receiving wages from his father, and down to the time of his marriage paying or promising to pay his father for his board. There is nothing in the report to show that the orator and his wife were not supported upon the farm to their satisfaction and to the satisfaction of the orator after his wife's decease, down to January, 1901, when Edgar turned his father out-doors and denied that he had any right upon the premises.

But whether or not the lease from Edgar to his father of the farm, stock, and other personal property thereon was intended by the parties as the means of supporting the orator and his wife in compliance with the will, it is certain that Edgar thereby, with the consent of his parents, put it out of his power to support them from the farm during the continuance of the lease.

The case clearly shows that while there was no express waiver by the orator of the provision in the will for the support of himself and his wife, he assumed to furnish such support himself and relieve his son from furnishing it. His engagements with grocers and others to furnish family supplies and his subsequent voluntary payment therefor, saying nothing to his son upon the subject, the manner in which he carried on the farm and supported himself and wife must be

considered as a voluntary release of his son from his obligation under the will.

Although contracts or agreements between trustees and their *cestui qui trusts* are looked upon with suspicion by courts, it is held that a *cestui qui trust* may release a breach of a trust by giving to the trustee a formal release or a formal confirmation of the transaction; also that he may be debarred from relief by long acquiesence in a breach of the trust, though he did not originally concur in it. Perry on Trusts, 850, 851.

Upon the facts found the case falls within the rule relating to voluntary payments; that when a party pays money which he is under no legal obligation to pay, with full knowledge of the facts, he cannot recover it back. *Taggart* v. *Rice,* 37 Vt. 47; *Burnham* v. *Strafford,* 53 Vt. 610.

This case is similar to *Barnes* v. *Dow,* 59 Vt. 530, 10 Atl. 258, in its essential facts, and the rules of law that were applied in that case are applicable here. It was clearly the intention of Mrs. Borrowdale to provide a life support for her nephew and his father and mother out of the property devised. In *Barnes* v. *Dow* the testator secured the support for his sister by a devise of his estate to his executor in trust, and the remainder to the executor's nephew. It was there held that the devise created an active trust in the executor for the sister's support during her life, and that at her death the trust would terminate and the remainder vest in the nephew.

While in the present case no trust was created by the express terms of the will, Edgar, upon the death of the testatrix, became in law trustee of the estate and held it in trust for the life support of his father and mother. The trust was impressed upon the property by the terms of the devise.

No question has been made but that the orator's proper remedy is by a bill to foreclose Edgar of his life estate in the

farm on account of his failure to perform the conditions of the trust. It is the proper remedy.

There was no breach of the condition in the will by Edgar until January, 1901, when he notified his father that he had no right upon the farm and threatened "to sue him out." From January 17, 1901, when the orator went to Wisconsin, to August 2, 1901, when the trial before the master began, eighty-eight and three-sevenths weeks, the orator supported himself, and his support at three dollars a week, amounted to $265.28, for which and interest thereon his administrator is entitled to a decree; also three dollars a week from August 2, 1901, till the orator's death with interest upon that sum.

The defendant cannot offset the amount of his promissory note, nor the $19.22, balance due upon his judgment against the orator, for the reason that he became bound, by accepting the bequest, to support his father and mother during their lives, and any indebtedness from his father to him could not relieve him from that obligation.

There is no occasion to consider the subject of the defendant's waste, for the orator had no claim upon the farm other than for support, which was provided him down to January, 1901, and the orator died after the hearing before the master.

The pro forma decree is affirmed so far as it relates to the reforming and construing of said quit claim deeds, but is reversed in respect to the sum due the orator. The cause is remanded with mandate that the court of chancery enter a decree for the orator's administrator for $265.28 and interest thereon since August 2, 1901, to be computed by the clerk, who will also compute the amount due the orator for his support from August 2, 1901, until his death, at three dollars per week, which sums shall be paid by the defendant

Edgar within a time to be fixed by the court of chancery, in default of which payment he and Maude Hoyt, his wife and the other defendants shall be foreclosed and forever barred of all right, title and all interest in said farm.

S. CASSELINI *v.* GEORGE BOOTH.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 11, 1905.

Trover—Intoxicating Liquor—Officer—Justification Under Process—Void Precept—Justice of the Peace—Jurisdiction—Complaint—Search Warrant.

A justice of the peace has no authority to issue a warrant for search and seizure of intoxicating liquor, under § 61, No. 90, Acts 1902, upon a written complaint which recites that the complainant "in his own proper person and upon his oath of office makes complaint," but does not disclose the complainant's office; and such warrant so issued and attached to such complaint is void and affords no protection to the officer serving the same.

TROVER for one barrel of ale. Plea, the general issue, with notice of justification under a search warrant issued by a justice of the peace, and directed to the defendant as police officer of the city of Barre. Trial by court in the City Court of the city of Barre, *Fay*, Judge. Judgment for the defendant. The plaintiff excepted.

The complaint in question was exhibited to the justice of the peace who signed and issued the warrant. But said com-

plaint contains no reference to any justice. It begins: "To the City Court, within and for the city of Barre, in the County of Washington:

Comes Charles Zanleoni, and for said city of Barre, in his own proper person, and upon his oath of office makes complaint" etc.

H. C. Shurtleff for the plaintiff.

Gordon & Jackson for the defendant.

TYLER, J. This action is trover for one barrel of ale. The defendant admitted the taking of the property, but justified the act upon the ground that it was by virtue of a search warrant directed to him as a police officer of the city of Barre by a justice of the peace. The trial court found the facts set out in the plea and notice and further found that the complainant was one Charles Zanleoni, who was a native of Italy and had taken no steps towards naturalization other than that he had filed in the City Court of the city of Barre, which is a court of record having a seal, his intention to become a citizen of the United States; that the ale was found by the defendant in circumstances which warranted him in believing that it was kept for sale or other unlawful disposition, and that he believed that the complainant was a citizen of the United States. The complaint recited that the complainant "in his own proper person and upon his oath of office" made complaint, etc.

It is the law that a ministerial officer is protected in the execution of process, when it issues from a court of general jurisdiction, although such court, in fact, has no authority in the particular case, provided it appears upon the face of the process that the court has jurisdiction, and nothing appears to apprise the officer that the court has no authority. But it is

also held that if a ministerial officer executes any process upon the face of which it appears that the court which issued it had not jurisdiction of the subject matter nor of the person or the process, such process will afford the officer no protection for acts done under it. 2 Am. & Eng. Ency. 893 and cases cited in the notes; *Savacool* v. *Boughton,* 5 Wend. 170, 21 Am. Dec. 181; *Driscoll* v. *Place,* 44 Vt. 252; *Carlton* v. *Taylor,* 50 Vt. 220; *Vaughn* v. *Congdon,* 56 Vt. 111.

It is not contended that the justice could issue a warrant without a complaint being made to him in writing by an officer or a private citizen, upon oath, in compliance with Sec. 61, No. 90, Acts of 1902. It is within his jurisdiction to issue his warrant for search and seizure, but he must be moved to issue it by complaint made pursuant to the statute. He could not have issued the warrant of his own motion.

It cannot be maintained that this process was regular upon its face. Zanleoni professed to make complaint upon his oath of office but did not disclose the office. If he intended to complain as a private citizen, he did not so declare; therefore the justice of the peace had no more authority to issue the warrant than he would have had if the complaint had not been signed by any person. See *Goodell* v. *Tower,* reported in this volume, 58 Atl. 790, and cases cited in the opinion.

As it does not appear upon the face of the process that Zanleoni had any authority to make the complaint as state's attorney, city attorney, as a city grand juror, nor as a private citizen, the process was void and afforded the defendant no authority for serving it.

Judgment reversed and cause remanded.

TOWN OF BRIGHTON *v.* M. L. KELSEY.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 11, 1905.

Action on Penal Statutes—Minute of Magistrate upon Writ—Sufficiency.

Changes made in a revision of the statutes will not be regarded as altering the law when it was well settled by plain language in the statute or by judicial decision, unless it is clear that such was the intention.

In actions on penal statutes, the minute required by V. S. 1993 to be made upon the writ, by the magistrate signing it, of the day, month, and year when the same "was" signed, is no part of the writ itself; the minute is required to be made upon the perfected writ.

Just above the magistrate's signature to a writ in an action on a penal statute was the following: "Signed and dated at Brighton in the County of Essex this 7th day of June, 1904." *Held*, that this was not a compliance with the requirement of V. S. 1993, and the writ, on motion should be dismissed.

CASE to recover the penalty given by V. S. 382. Heard on motion to dismiss the writ, and on demurrer to the declaration, at the October Term, 1904, Essex County, *Start*, J., presiding. The motion to dismiss was overruled. Thereupon the defendant demurred. Demurrer overruled, *pro forma*, and declaration adjudged sufficient. The defendant excepted. The opinion states all the facts pertinent to the question decided.

Young & Young for the defendant.

The motion to dismiss should have been granted. The mere interlining of the words "Signed and" in the date required by the statutory form is no compliance with the requirement of V. S. 1993. *Wheelock* v. *Sears*, 19 Vt. 559; *Dassance* v. *Gates*, 13 Vt. 275; *School Dist.* v. *Austin*, 46 Vt. 90; *Montpelier* v. *Andrews*, 16 Vt. 604.

H. B. Amey, H. B. Howe, and H. W. Blake for the plaintiff.

The minute in question is a compliance with the requirement of the statute. *State* v. *Brainard*, 57 Vt. 369.

WATSON, J. In the court below, the defendant moved to dismiss the writ because the magistrate signing the same did not enter upon it a minute of the day, month, and year when he signed it, as required by section 1993 of Vermont Statutes. To the overruling of this motion, the defendant excepted. No question is made but that the action is within the purview of this statute. Just above the magistrate's signature to the writ itself are the words and figures following: "Signed and dated at Brighton in the County of Essex this 7th day of June, A. D. 1904." This, the plaintiff contends, answers the requirements of the statute in this behalf. By V. S. 1992, "When a complaint, information, or indictment is exhibited in a case mentioned in this chapter, the clerk of the court or magistrate to whom it is exhibited shall, at the time, make a minute thereon in writing, under his official signature, of the day, month, and year when the same was exhibited;" and by section 1993, "When an action is commenced in a case mentioned in this chapter, the clerk or magistrate signing the writ shall enter upon it a minute of the day, month, and year when the same was signed."

The law of these two sections was originally and for a long time in one section, and an examination of the phraseology there used throws light upon the question before us. In the Statutes of 1787, p. 91, the law reads: "And whenever any indictment, presentment, information, complaint, or declaration, shall be exhibited or drawn on any penal statute, the day, month, and year of the exhibition thereof into any office, or to any officer, which may lawfully receive the same, or of signing the writ, without any antedate thereof, shall be truly marked on such process or proceeding, by the same officer, without any fee for the same; and the said process or proceeding shall be taken to be of record from that day forward and not before." In the compilation of 1797, p. 595, it reads: "That when any bill, complaint, information or indictment shall be exhibited, or any action or suit brought or commenced, * * * the clerk of the court or magistrate to whom such bill, complaint, information or indictment shall be exhibited, or who shall sign the original writ in such action or suit, * * * shall at the time of exhibiting or signing as aforesaid, make a minute in writing under his official signature, on such bill, complaint, information, indictment or original writ, of the true day, month and year, when the same was so exhibited or signed."

Thus it is seen that in the early statutes the character of the proceedings, whether criminal or civil, made no difference. The provision was the same: the clerk of the court or magistrate at the time of the exhibiting of the indictment, etc. or signing the writ, was required to make a minute thereon in writing under his official signature, stating the true time when the same was exhiibted or signed, and for the same purpose, namely, that the process or proceeding might thereby show the day when it should be taken of record in computing the statutory period within which the same could be commenced.

In the revision of 1839, these provisions were divided into two sections, as they now are, but the substance of the law was not changed and has not been to the present time, hence the construction should be the same. The fact that since the division the section relating to complaints, informations, and indictments, in providing that the clerk of the court or magistrate shall "make a minute thereon in writing, under his official signature, of the day, month," etc., uses the same language which was used before the division, while in the section relating to civil actions the language is that he "shall enter upon" the writ "a minute of the day, month," etc. is not such a difference in phraseology as shows an intention that the latter section shall receive a different construction. The rule is, that "changes in a revision will not be regarded as altering the law when it was well settled by plain language in the statute or by judicial construction, unless it is clear that such was the intention." *Clark* v. *Powell,* 62 Vt. 442, 20 Atl. 597; *Whitcomb* v. *Davenport,* 63 Vt. 656, 22 Atl. 723.

In *State* v. *Perkins,* 58 Vt. 722, 5 Atl. 894, it was held that the minute was a substantive and material requirement of the proceedings against the respondent, which might be determinative of the prosecution, and that it was no part of the complaint itself. That case is authority here.

There is no writ until it is signed by someone having authority to issue the same, and the date is a part of it. The prefixing of the words "signed and" to the date, as was done in this case, is not a compliance with the statute; for thereby the magistrate signing the writ does not *enter upon it* in writing under his official signature a minute of the day, etc., when the same *was* signed. To fulfill the purposes of this requirement the minute must be made upon the perfected writ, and the official signature thereto must clearly be for that purpose, rather than to issue the writ. That this is the true construc-

tion appears from the past tense of the verb used in the statute in that connection. It also appears from the laws of 1787. Then, as now, a fee was allowed by law for signing a writ; yet the statute before quoted expressly provides that the minute required thereby shall be made by the officer signing the writ, "without any fee for the same." Thus showing that the making of the minute was an act independent of the signing of the writ. The motion to dismiss should have been granted.

This being decisive of the case, the questions argued upon the demurrer are not considered.

Judgment reversed, and judgment that the writ be dismissed with costs.

STATE *v.* JOSEPH MARSHALL.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 14, 1905.

Criminal Law—False Pretences—False Personation—Obtaining Property by — Evidence — Similar, Connected Frauds—V. S. 4959 and 4960—Relation—Conviction under Either Section.

The false personation of another, with the intent thereby to fraudulently obtain property, is a "false pretence," within the meaning of V. S. 4960.

An information alleging that the respondent, by falsely personating a person to whom a bank check was intended to be delivered,

fraudulently obtained said check, charges the offence described in V. S. 4959, and also charges an offence under V. S. 4960.

In a prosecution under such an information, if the State shows that the respondent obtained the check by falsely personating another, and that the check was intended to be delivered to the person so falsely personated, a conviction may be had under V. S. 4959. But if all this is shown, except that it appears that the person so personated had no interest in the check and that it was not intended to be delivered to him, unless he was the respondent, then the respondent may be convicted under V. S. 4960.

A person obtained property in this State by, in a letter written by him without this State, deceitfully representing himself to be another person, and by falsely personating that other person in an interview within this State with the person by whom said letter was received, for whom it was intended, and from whom the property was obtained. *Held*, that thereby the offence of obtaining property by false pretences was committed in this State.

In a prosecution for fraudulently obtaining property by falsely personating another, when it appears that the respondent had referred the person deceived to a book published by R. G. Dun & Co., to determine the rating of the party personated, and that the deceived person had thereupon examined the then current book of R. G. Dun & Co. for that purpose, said book is admissible in evidence.

When several crimes form a part of one transaction, and are part of the same plan, or induced by the same motive, they may be shown in evidence to reduce the probability of innocence.

In a prosecution for fraudulently obtaining a bank draft by falsely personating another, a letter written by the respondent subsequent to the procuring of the draft in question, in which he asked the deceived person to send him a draft for $100, and also the draft sent in compliance with that request, are admissible in evidence, when the other evidence tends to show that the obtaining of this draft was a part of the same fraudulent scheme by which the draft described in the complaint was obtained.

INFORMATION for fraudulently obtaining a bank check by falsely personating another. Plea, not guilty. Trial by jury at the September Term, 1903, Chittenden County, *Tyler*, J. presiding. Verdict, guilty; judgment and sentence thereon.

The respondent excepted.

It appeared that on the 20th day of September, and for some time previous thereto, The O. L. Hinds Co., mentioned in the information, was a corporation organized under the laws of the State of Vermont, and engaged at Burlington, Vt., in the business of manufacturing and selling at wholesale overalls and other wearing apparel; that it employed travelling salesmen in said business, and in September, 1903, was in need of such salesmen to travel for it in Missouri, Kansas, and the Territories; that it advertised in some of the newspapers published in the city of New York for experienced salesmen to travel and sell its goods in said territory; that the respondent, then in the city of New York, answered these advertisements, or some of them, and after making some inquiries, applied for the situation, and was finally employed by said corporation as its travelling salesman in said territory; that all the arrangements, including the negotiations leading up to, and ending in the contract for respondent's services, were by correspondence, and the final contract was executed by the respondent in the city of New York; that the respondent was never in the State of Vermont, except on the occasion when he obtained the check mentioned in the information; that, under the terms of the said contract for respondent's services, the respondent was to travel for said corporation in said territory and sell their goods for a commission of 7% on such sales as he made, and that said corporation was to advance the respondent $160 per month for travelling expenses, which was to apply on the sums due him as commissions on such sales.

The evidence of the State tended to show that said corporation knew nothing of the respondent, or of any Joseph H. Marshall, previous to said correspondence with the re-

spondent; that pending the execution of the final contract of employment, and during the negotiations for his employment, and in response to inquiries by O. L. Hinds Co. for information as to who respondent was, and what was his financial standing, the respondent wrote to said corporation that he was Joseph H. Marshall of Atlantic, Iowa; that he had large property interests in that place, and in certain other places; that The O. L. Hinds Co. might refer to the book published by R. G. Dun & Co. for the purpose of ascertaining the rating of Joseph H. Marshall of Atlantic, Iowa, who the respondent said he was.

The evidence of the State tended to show that said corporation, previous to the employment of the respondent, made diligent inquiry as to the standing of Joseph Marshall of Atlantic, Iowa, whom it supposed the respondent to be; that it consulted the current book of R. G. Dun & Co., to determine the rating of said Joseph H. Marshall of Atlantic, Iowa, and corresponded with several parties to whom it was referred by the respondent, for the same purpose; that this investigation by said corporation convinced it that Joseph H. Marshall of Atlantic, Iowa, stood very high, and was such a man as they wanted to employ.

The evidence of the State tended to show that there was a Joseph H. Marshall of Atlantic, Iowa, who answered in every particular to the man whom said corporation supposed it had employed, but that the respondent was not that person; that the respondent had no business relations in Atlantic, Iowa, and that he had fraudulently personated said Joseph H. Marshall, for the purpose of procuring property from said corporation.

The evidence of the State further tended to show that, on the 21st day of September, 1903, and after said contract of employment was executed, and in compliance with the

request of said corporation, the respondent went to Burlington, Vt., to receive instructions, and become acquainted with the stock carried by said corporation, previous to beginning his work as salesman in said territory; that while at said Burlington on this occasion, in a conversation with the president of said corporation, the respondent spoke of his business in Atlantic, Iowa, and of a store he had there which his brother was in charge of; that on this occasion, at said Burlington, respondent obtained the check mentioned in the indictment, as the first instalment of his travelling expenses, under said contract; that said check was for the sum of $100, drawn by said corporation, by its president, on a bank in said Burlington, and was procured to be cashed by the respondent in Burlington, Vt.

The evidence of the State further tended to show that some time after respondent had left said Burlington, he made a requisition upon said corporation for another hundred dollars; that he asked for this in a letter written from St. Louis, Mo., in which letter the respondent represented that he had entered upon said business of salesman, and gave some account of his success, and of the expenses wherewith he had used up the $100 obtained on the check described in the information. Under the exception of the respondent, the State was allowed to put in evidence, this letter, and the draft of $100 which was sent the respondent by said corporation in response to said requisition.

It appeared that the real Joseph H. Marshall, of Atlantic, Iowa, had no interest in the check described in the information, and that it was not intended to be delivered to him, unless he was the respondent.

V. A. Bullard for the respondent.

The offence charged in the information is that named in V. S. 4959. It is not the crime of obtaining property by "false pretences," which is described in V. S. 4960. The State, under this information, must show that the check in question was intended to be delivered to the party personated. Because it appeared that the person personated had no interest in the check, and it was not intended to be delivered to him, the motion of the respondent that a verdict of acquittal be ordered should have been granted. 12 Am. & Eng. Enc. 787; *Kirtley* v. *State,* 38 Ark. 542; *Jones* v. *State,* 22 Fla. 532; *Goodson* v. *State,* 29 Fla. 511, 30 Am. St. Rep. 135; *Williams* v. *State,* 49 Ind. 367; *U. S.* v. *Curtain,* 43 Fed. Rep. 433.

The contract was made in the State of New York, hence no crime was committed in this State. 12 Am. & Eng. Enc. 1244; *Rex* v. *Buttery,* 10 E. C. L. 215; *People* v. *Higbee,* 66 Barb. 134.

Alfred L. Sherman, State's Attorney, for the State.

START, J. At the close of the evidence, the respondent moved for a verdict of acquittal, for that the crime charged, if committed, was not committed in Vermont but in the State of New York, and because the person personated had no interest in the check which the respondent procured of The O. L. Hinds Co., and the same was not intended for him. The information, as amended, charges that Joseph H. Marshall of Burlington in the county of Chittenden, on, to wit, the first day of October, 1903, at said Burlington in the county of Chittenden, feloniously, unlawfully and designedly, did falsely personate one Joseph H. Marshall of Atlantic, Iowa, and represent himself to The O. L. Hinds Co., a corporation organized and existing under the laws of the State of Ver-

mont, with main office at Burlington, Vermont, to be the said Joseph H. Marshall of Atlantic, Iowa, and thereupon, did then and there to the said The O. L. Hinds Co. falsely assume the name and person of the said Joseph H. Marshall of Atlantic, Iowa, by means of which false assertion and pretence the said Joseph H. Marshall then and there unlawfully, knowingly and designedly, fraudulently received of The O. L. Hinds Co. a certain order for money commonly called a bank check, which said bank check was dated on the 21st day of September, 1903, and drawn on the Howard National Bank to the order of Joseph H. Marshall, for the sum of one hundred dollars, and signed, "The O. L. Hinds Co., O. L. Hinds, President," which said bank check was of the value of, to wit, one hundred dollars, the monies and goods and chattels of the said The O. L. Hinds Co., which was then and there by the said The O. L. Hinds Co. intended to be delivered to the said Joseph H. Marshall of Atlantic, Iowa, the person so falsely personated, as aforesaid, with the intent of him, the said Joseph H. Marshall, to fraudulently convert the same to his own use, against the will of the said The O. L. Hinds Co., contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State. This information sufficiently charges an offence under V. S. 4960, which provides, among other things, that a person who designedly by false pretences or by a privy or false token and with intent to defraud, obtains from another person money or other property, shall be imprisoned in the state prison not more than ten years, or fined not more than one thousand dollars.

The false personating of another, for the purpose of fraudulently obtaining property, is a false pretence, and, if a person by so personating another obtains property, he does so by false pretence, within the meaning of the statute above

referred to; and, under an information charging the obtaining of property by falsely personating another, one may be convicted for obtaining property by false pretences, for he thereby obtains property by false pretences. In 2 Bishop's New Criminal Law, 152, it is said: "If one represents himself to be another person, whereby he accomplishes a cheat, his visible presence is a token, which if false, is a false token. Indeed a false personation is a false pretence within statutes prevailing everywhere." In *Commonwealth* v. *Drew*, 19 Pick. 179, it is held that the assumption of a fictitious name is a false pretence within the meaning of a statute which provides, that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons money, goods, wares, merchandise or other thing, with intent to cheat or defraud any person or persons of the same, shall on conviction be punished as in the statute is specified. The information being sufficient to justify a conviction upon evidence showing that the respondent procured the check from The O. L. Hinds Co. by false pretences, and the evidence having such tendency, the fact that Joseph H. Marshall of Atlantic, Iowa, had no connection with the check, and that the same was not intended for him, unless he was the respondent, if such was the fact, was immaterial, and notwithstanding such fact, the respondent could be rightfully convicted, under the information, of the offence of obtaining the check by false pretences, contrary to the provisions of V. S. 4960. Nor is the fact, that, if it had appeared that Joseph H. Marshall of Atlantic, Iowa, was interested in the check, and that the same was intended for him, the respondent might have been convicted of an offence under V. S. 4959, which provides, that a person who falsely personates or represents another, and in such assumed character receives money or other property intended to be delivered to the party so personated, with intent

to convert the same to his own use, shall be imprisoned in the state prison not more than ten years, or fined not more than five hundred dollars, or both, material; for, as we have seen, the obtaining of property by falsely personating another is obtaining property by false pretences, and, if the state showed that the respondent by such pretences received property intended to be delivered to the party personated, a conviction could be had under section 4959, and failing in this, the respondent could be convicted of an offence against section 4960, if it appeared that he obtained the property by falsely personating another. This last mentioned section, in effect, prohibits the obtaining of property by falsely personating another, and, if the property was not intended for the person personated, the offence is clearly punishable under this section, and under an information charging false personation; therefore, the respondent's motion, in so far as it was based upon the fact that Joseph H. Marshall of Atlantic, Iowa, had no interest in the check and that the same was not intended for him, unless he was the respondent, was properly denied. Nor was the respondent entitled to a verdict of acquittal upon his claim that the offence, if any, was committed in New York and not in Vermont. The material false pretences by the respondent consisted in his falsely representing, in a letter written to The O. L. Hinds Co. from New York and received by the Company at Burlington, Vermont, that he was Joseph H. Marshall of Atlantic, Iowa, and in his coming to Burlington, Vermont, as such Joseph H. Marshall and there, by his presence, after writing The O. L. Hinds Co. that he was Joseph H. Marshall of Atlantic, Iowa, and by his statements to The O. L. Hinds Co., personating said Joseph H. Marshall of Atlantic, Iowa, and thereby procuring from The O. L. Hinds Co. a check of the value of one hundred dollars. In so doing, the respondent did, in this State, by false pretences, obtain

property contrary to the provisions of our statute, and did thereby subject himself to punishment in this State.

The respondent, in the course of his correspondence with The O. L. Hinds Co., had referred them to a book published by R. G. Dun & Co., for the purpose of showing the commercial rating of Joseph H. Marshall of Atlantic, Iowa, whom he represented himself to be; and The O. L. Hinds Co. had examined the then current book of Dun & Co. for the purpose of ascertaining the rating of Joseph H. Marshall. The book thus examined was received in evidence, subject to the respondent's exception. The respondent having referred to the book of Dun & Co. for his commercial rating, without naming any particular book, it must be taken as a reference to a book which showed his then rating, which was the then current book, and The O. L. Hinds Co., having examined the then current book pursuant to the respondent's suggestion, for the purpose of ascertaining his commercial rating, that book was admissible in evidence for the purpose of showing what representation the respondent made respecting his commercial rating. He, in effect, made the rating which appeared in the book of R. G. Dun & Co. his representation of his financial standing, and that rating was admissible as a representation of his which was relevant to the issues in the case.

The State was allowed, subject to the respondent's exception, to introduce in evidence a letter written by the respondent to The O. L. Hinds Co. subsequent to the procuring of the check mentioned in the information, in which he asked The O. L. Hinds Co. to send him a draft for one hundred dollars; and the draft was sent pursuant to the request. The other evidence tended to show, that the respondent by fraud procured from The O. L. Hinds Co. a contract, by the terms of which they agreed to advance money from time to time to him; that it was the respondent's original plan and scheme

to procure money from time to time from The O. L. Hinds Co. by fraud; and that the letter was written and the draft procured pursuant to his original plan and scheme, and were so far connected with the fraudulent procuring of the check mentioned in the information that they were admissible for the purpose of lessening the probabilities of his being innocent of the crime charged in the information. Where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same subject-matter; and when several crimes form a part of one entire transaction and have some connection with each other, as a part of the same plan or induced by the same motive, they may be shown to reduce the probability of innocence; and for this purpose, subsequent representations are equally admissible with prior ones, for it is the repetition of them that is significant, and a subsequent instance reduces the probability of innocence equally as well as a prior one, and the criminality of prior or subsequent acts or representations does not affect their admissibility, if they are otherwise relevant. Wigmore on Evidence, sections 216, 305, 320.

Judgment that there is no error, and that the respondent take nothing by his exceptions.

Olive O. Sawyer, et al. *v.* Sarah Emeline Churchill and Zebedee P. Churchill's Administrator.

October Term, 1904.

Present: Rowell, C. J., Tyler, Start, Watson, Haselton, and Powers, JJ.

Opinion filed February 20, 1905.

Husband and Wife—Contract in Fulfilment of Ante-Nuptial Contract—Specific Performance—Contemplated Separation—Public Policy—"To Wit" in Contracts—Consideration—Widow's Waiver—V. S. 2532.

When a woman, by her written and sealed contract expressed to be in consideration of $300, paid her by her husband, released him from all claims which she, as his wife, might have upon him, that release exhausted the consideration; and a subsequent provision of said contract, whereby "for said consideration" she conveyed to his children all interest which, as his widow, she might have in his estate, was without consideration.

The phrase "to wit," when used in a recital in a written contract, in referring to a date, has no materiality.

The widow's waiver, contemplated by V. S. 2532, is of some provision the benefit of which she is to get upon or after her husband's death.

The State is, on grounds of public policy, interested in the permanency of the marriage relation; and courts of equity will not enforce the performance of contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable future separation, and tending to effect such a separation.

A court of equity will not enforce a written and sealed contract, executed and delivered by a woman to her husband within five months after their marriage, whereby, in consideration of $300, paid her by him, she releases him from all claims which she, as his wife, may have upon him, and which recites that it is in fulfilment of a contract made between them on their wedding day in which she agreed to so release him for $300.

APPEAL IN CHANCERY. Heard on Sarah Emeline Churchill's demurrer to the bill, at the December Term, 1903, Windsor County, *Munson,* Chancellor. Demurrer sustained, and bill dismissed, as to the demurrant, with costs.

The orators appealed.

The contract sought to be enforced is as follows:

"Whereas I, Sarah E. Churchill, have heretofore to wit: on the 21st day of January, 1898, entered into a contract with Z. P. Churchill, my husband, in which for the sum of Three Hundred Dollars I agreed to release him from all claims which I, as his wife might have upon him, and whereas said sum has been to me in hand paid, and the receipt of which I hereby acknowledge.

Now therefore, I, Sarah E. Churchill, in consideration of said sum of three hundred dollars, do hereby release said Z. P. Churchill from all claims which I as his wife may have upon him, and hereby agree to maintain myself in sickness or in health so that neither I nor any one in my name or behalf shall hereafter have any claim upon him whatever.

And I further, for said consideration, do hereby release, assign and convey to Olive O. Sawyer, Mark Z. P. Churchill, Addie B. Crowell, Edna M. Bradley and Lucy I. Fletcher, children of the said Z. P. Churchill, or their heirs, all right, title, interest or claim, which I, the said Sarah E., may have as a widow in or to the estate of said Z. P. Churchill, including right of dower or homestead therein.

In witness whereof I hereunto set my hand and seal at in the State of Vermont, this 7th day of June, A. D. 1898."

Sarah E. Churchill. (L. S.)"

Gilbert A. Davis for the orator.

The orator's only remedy is in equity. *Mann* v. *Mann Est.*, 53 Vt. 48-56; *Graves* v. *Wakefield*, 54 Vt. 313; *Meech* v. *Estate of Meech*, 37 Vt. 414; *Chaffee* v. *Chaffee*, 70 Vt. 231.

The contract has been fully performed on the part of Zebedee, and the parties cannot be placed in *statu quo*. *Coolidge* v. *Brigham*, 1 Met. 547; *Allen* v. *Edgerton*, 3 Vt. 442; *Hammond* v. *Buckmaster*, 22 Vt. 378; 2 Parsons on Contracts, 679; *Beed* v. *Blanford*, 2 Young & J. 278; *Norton* v. *Young*, 8 Greenl. 30.

Hunton & Stickney for defendant.

The agreement is against public policy, and not binding upon the widow, if she elects to waive it. Whether she may waive it is discretionary with the probate court. *Bethel Sch.* v. *Sheldon*, 71 Vt. 95; *Mann v. Mann*, 53 Vt. 48.

HASELTON, J. This is a bill in chancery brought by the children of Zebedee P. Churchill, deceased, against Sarah Emeline, his widow, and against the administrator of said Zebedee. The bill sets up among other things, that said Sarah Emeline was the third wife of said Zebedee and not the mother of any of his children; that she was married to him January 21, 1898, and that she lived with him only about five months, when by mutual consent a separation took place, and that they ever after lived apart from each other, the said Zebedee dying December 17, 1902; that after said separation, said Sarah Emeline did nothing towards the support and care of said Zebedee, who was an old man in need of care, comfort, and assistance.

The bill further states that June 7, 1898, which was within five months after the marriage, the said Zebedee and the said Sarah Emeline entered into a certain written and

sealed contract which is set forth. This instrument, however, recites a contract made between husband and wife on their wedding day, by virtue of which the wife should release the husband from all claims which she, as wife, might have upon him, upon the payment by him to her of the sum of $300.00. The instrument further recites the payment of the $300.00 and proceeds as a release from her to him of all claims upon him as wife, and an agreement to maintain herself in sickness or in health and without any claim upon him by her or in her behalf. In referring to the date of the wedding as the date of the contract, the phrase "to wit" is used, but this instrument is not a piece of pleading and the phrase has here no materiality. The bill further sets out that the husband paid the $300.00, and that this instrument was thereupon delivered by the said Sarah Emeline to the said Zebedee, and that he accepted it, and retained possession thereof until his death. It would appear, then, that contemporaneously with the contract of marriage solemnized by the State, there was an agreement between the parties that marital rights and obligations should cease whenever the husband should pay the wife the $300.00 specified. To avoid harsh phraseology, the marriage seems to have been experimental, so far as the parties thereto could make it so; a travesty of marriage and a mockery of marriage vows.

The instrument further recites that for the "same consideration" the said Sarah Emeline releases, assigns, and conveys to the orators all right, title, interest or claim which she "may have as widow" in or to the estate of her said husband. But according to the recitals of the instrument, this consideration was exhausted in the procurement of the release of the claims of the wife to support, and so there was no consideration for the assignment to the orators of any claim which she "as widow" might thereafter have upon her hus-

band's estate. There was no consideration for the assignment moving from the orators, or from the husband or any one else for the benefit of the orators. The bill further sets out, in effect, that there was no rescission, or attempted rescission, of the contract in the life-time of Zebedee, and that after his death, on the 25th day of July, 1903, and not before, she offered to "return" the principal sum of $300.00 to the administrator of said Zebedee. It appears from the bill that this offer was in the presence of the probate court, and that the orators protested that the administrator should not accept the offer. It further appears from the bill that June 6, 1903, the said Sarah Emeline filed a widow's waiver as full and complete as could be filed under the Vermont Statutes and amendments thereto, and demanded an allowance out of the estate. However, the widow's waiver, contemplated by the statute, is of some provision of some kind the benefit of which she is to get upon or after the husband's death. *Chaffee* v. *Chaffee*, 70 Vt. 231, 40 Atl. 247; Acts of 1896, No. 44. The bill further states that the sum of $300.00 paid to said Sarah Emeline was a just, adequate and reasonable share for her out of the estate of her husband.

The bill prays that specific performance on the part of said Sarah Emeline Churchill may be decreed, that temporary restraining orders may be made, and that general relief may be granted. On demurrer the bill was dismissed and the orators appealed.

We think that the court of chancery was right in dismissing the bill. Separation agreements, not contemplated at the time of marriage, and not brought about by a frivolous view of the marriage obligation, may come about for such reasons, and may be of such a character, that courts of equity will recognize them and will enforce the specific performance of pecuniary agreements relating thereto. But the State is,

on grounds of public policy, interested in the permanency of a marriage relation which it has sanctioned, and courts of equity ought not to enforce the performance of contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and, in the nature of things, tending to bring such a separation about. *Squires* v. *Squires*, 53 Vt. 208, contains in the opinion of the Court delivered by Judge Veazey, a valuable discussion of separation agreements, and points out those that courts may recognize, at least for some purposes. A lengthy and able review of the history and doctrine of agreements for separation is found in the recent case of *Foote* v. *Nickerson*, 70 N. H. 496, 48 Atl. 1088.

But there is hardly need in this case to refer to the very numerous and very conflicting cases which relate either to separation agreements, or to some of the incidents thereof. The bill, as drawn in this case, seems to have to do with an option of separation, taken and given on the occasion of the marriage,—an option of such a character that, in any resulting state of things, a court of equity ought not to interpose.

The decree of the court of chancery dismissing the bill is affirmed and the cause is remanded.

PATRICK LUCIA *v.* STATE OF VERMONT.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 20, 1905.

Rape—Petition for New Trial.

On a petition for a new trial on a charge of rape it appeared that on the trial the prosecutrix, fourteen years of age, testified that the respondent had sexual intercourse with her against her will; that he was convicted of an assault with intent to rape; that about a year after the trial prosecutrix, while in jail for some immoral conduct, made affidavit that her testimony on the trial was "largely false," and that she was compelled by her father to testify as she did. The counter affidavits showed that the prosecutrix's depravity developed after the trial; that she had stated after the trial that her testimony on the trial was true, and that "what she had later said about her father having compelled her to testify was not true." *Held*, that the respondent was not entitled to a new trial.

PETITION for a new trial, brought under V. S. 1662, to the Supreme Court for Chittenden County at its January Term, 1905, and then heard on testimony taken and filed. The opinion states the facts.

Martin S. Vilas and *R. E. Brown* for the petitioner.

Alfred L. Sherman, State's Attorney, for the State.

It is a presumption of law that the testimony of the prosecutrix given on the trial is true, and that her subsequent contradictory statements made out of court are false. *People* v. *McGuire*, 2 Hun. 269; *Holtz* v. *Schmitz*, 44 N. Y. Supp. Ct. 327; *Lasseter* v. *Simpson*, 78 Ga. 61; *Lake* v. *Hardee*, 55 Ga. 667; *Simms* v. *Simms*, 12 Hun. 231; 14 Ency. Pl. & Pr. 811.

HASELTON, J. At the March Term, 1903, of the Chittenden County Court the petitioner was tried upon a charge of rape upon Catherine Myers, a girl of about the age of fourteen years. The said Catherine testified on trial that on the occasion to which the charge related the petitioner had actual sexual intercourse with her forcibly and against her will. The State introduced evidence of a circumstantial nature tending to corroborate the testimony of the said Catherine. The respondent introduced evidence tending to discredit her testimony. The jury found the respondent guilty, not of rape, but of an assault with intent to commit rape. On the evidence as it stood, they might well have reached the conclusion which their verdict announced. Judgment was rendered on the verdict, and the petitioner was sentenced to confinement in the State Prison for not less than three years, nor more than three years and a half. His imprisonment under the sentence began April 10, 1903, and has since continued.

The petition sets out that a new trial is asked on the ground of newly discovered evidence. More precisely the claim is that the girl has retracted her testimony, a claim of the discovery of the fact that on a new trial the State would be without material evidence which it had on the trial at the March Term, 1903.

The petition for a new trial is accompanied by affidavits taken both on the part of the respondent and of the State. There is no affidavit tending to show that for about a year after the trial of Lucia the girl said or intimated to any one that she had given any false testimony. Nearly all of the affidavits tend to show that about a year after the trial, when she had come to be nearly sixteen years of age, she was an inmate of the Chittenden County jail and was immoral and depraved. Of the persons who gave affidavits in behalf of the petitioner, one deposes that she was in jail "on some kind of

an immorality charge," another that she was awaiting trial on a charge of "immoral conduct," another that "she seemed to be entirely destitute of morality," and that he was "particularly struck with her depravity," that "she acted and talked like a depraved woman of twenty-five." The petitioner produces an affidavit tending to show that from April 11, 1904, to August 8, 1904, she was once convicted on a charge of open and gross lewdness, and once on a charge of prostitution. Affidavits for the petitioner tend to show that after and not far from April 11, 1904, she talked in jail about the Lucia case in which she had testified as the complaining witness a year before. The affidavits on the part of the petitioner as to colloquial statements that she made vary to a great degree. One affiant deposes that she said that her testimony in the Lucia case "was mostly a lie," another that she said that "a considerable part" of it was not true, another that she stated "that her father put her up to tell the story against Lucia," another that she said, in effect, that "Lucia was innocent of the charge," and still another, that she said "Lucia is all right, he never touched me." No attempt is here made to cull out of the affidavits all the expressions which she is claimed to have used relative to her testimony in the case against Lucia, since her own affidavit taken while she was in jail is produced and will shortly be referred to.

The affiants for the petitioner, for the most part make oath to the effect that she said she was an unwilling witness against Lucia, that she was sorry for him, and wanted to get him out of prison, and that her father controlled her in the matter of her testimony and was to blame.

John Wilson Ketchum, an inmate of the jail while the girl Catherine was there, deposes that he told her "that she might make a statement that might straighten the matter out," and that at her request he sent for Lucia's attorney who

came and asked her what she wanted to say, and after talking with her drew up her statement which she read and signed. Her sworn statement subscribed and sworn to before the petitioner's attorney is this:

"I, Catherine Myers of Burlington, in said County, being duly sworn, on oath depose and state and I am not quite sixteen years old; that I was the complainant in the case of *State* v. *Patrick Lucia,* where the charge was rape; that I was carefully trained for the witness stand by my father, Alexander Myers, who hated Patrick Lucia and wanted to see him convicted; that my testimony was given unwillingly, but I was compelled to testify by my father, and that the testimony offered in the case by me was largely false. The above case was tried one year ago at the March Term of the Chittenden County Court, and resulted in the conviction of Patrick Lucia who is now serving his sentence at the State Prison at Windsor." This carefully drawn affidavit may fairly be taken to indicate the nature and extent of her retraction. She goes no farther than to say that her testimony was "largely false." But she had testified to an actual completed rape, whereas the jury had found Lucia guilty of an assault with intent to commit rape.

If every word of this affidavit be taken as the truth, still Lucia may have done such acts and things as to make him guilty of an assault with the intent to commit rape upon a girl under the age of consent.

But, if we assume that she meant to make affidavit that her testimony was false in every material respect, should a new trial be granted? The affidavits show beyond any fair doubt that Catherine's mother died when Catherine was about ten years old; that shortly after the death her father placed her in an orphan asylum at Burlington, where he kept her and paid her board, and where she had the nurture and training of

such institution, until a few months before the time when, according to the finding of the jury, the petitioner made upon her an assault with intent to rape, and when, according to the testimony of the girl as given in open court, he actually had intercourse with her. It satisfactorily appears from the affidavits that her depravity developed after this occasion, and after the time when she gave her evidence in court. Her father deposes to this effect, and to the effect that he in no way influenced her to swerve from the truth in her testimony at the trial. He further deposes, in substance, that about a year after the trial, he found himself unable to restrain her from following a wanton and vicious life, and that he caused her arrest, in an effort to save her. Andrew Liberty deposes, in behalf of the State, that he is a policeman and an uncle of Catherine, and that in April, 1904, he arrested her on a charge of prostitution preferred by her father. He further deposes that he told her that her father had caused her arrest, and that he told her that, if she had behaved herself, she would not have been in trouble, and that her reply was "my father thinks he is smart, but I will get even with him." William Collins deposes that he is a cousin of Catherine, and that, upon returning to Burlington after an absence of two years, he learned that she had been in jail on a charge of prostitution, and that he then saw her and, in substance, asked her why she had been in jail, and why she did not do better. According to his affidavit, she replied to the effect that Lucia had ruined her, and that she had got into the path she was following by reason of what Lucia had done. The affidavit of Collins places this conversation considerably later than the date of Catherine's affidavit of "retraction." Another affiant for the State, William G. Collins, deposes that he is on the regular police force of Burlington, that on the 16th of January, 1905, which was only about a week before the meeting of this

term of Court, he saw Catherine at the House of Correction at Rutland, and asked her about her testimony in the Lucia case and the affidavit which he understood she had made while in jail at Burlington. This officer further deposes in these words: "She would not admit having made the affidavit, and declared emphatically that what she swore to in the trial of the case against Lucia was the truth, and that what she had later said about her father having compelled her to testify was not true."

After the taking of this affidavit the petitioner took affidavits relating to what the girl had said while in jail at Burlington, and to a state of unfriendliness between the father of Catherine and the petitioner, but took no further affidavit from Catherine herself.

We have no hesitation or doubt as to what the action of this Court should be. The affidavit and the statements which she made in the jail at Burlington while mingling with the other inmates thereof were, clearly enough, not the result of a quickened love of truth, but rather of the hardened conscience and character of a girl who, at a susceptible age, had made a swift descent to depravity.

We have examined the girl's retraction, such as it is, in the light of her character, surroundings, impulses and passions at the time it was made, and, in connection with it, have reviewed the evidence at the trial as outlined in a statement furnished by the respondent's counsel, and have carefully examined all the affidavits accompanying the petition for a new trial, whether such affidavits are herein referred to or not, and, without invoking any presumption of law, or determining whether or not there is a presumption of law which could be invoked, we are fully satisfied that the petitioner was justly convicted of an assault with intent to commit rape.

The petition for a new trial is, therefore, dismissed.

JAMES H. CROSS *v.* RUFUS C. FLOOD, and DAYTON MOORE.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed February 20, 1905.

Libel—Innuendoes—Sufficiency of Declaration.

A libel may apply to a particular person, though such person is not named therein.

A declaration for libel, alleging the publication of a letter, wherein the writer stated that his wife had left him and taken his child with her; that he had not seen her since, but that she had been "frequently seen in the company of one Cross, a ticket agent at Rutland." "Couple this fact with the circumstance that my little girl was found in the home of the mother of this man Cross, * * * * and then read between the lines for a moment, and it is not hard for a person of ordinary intelligence to figure out the facts in the case,"—with proper innuendoes, is sufficient on demurrer.

LIBEL. Heard on general demurrer to the declaration, at the March Term, 1904, Rutland County, *Tyler*, J., presiding. Demurrer overruled, and declaration adjudged sufficient. The defendant excepted. The opinion states the substance of the declaration.

Butler & Moloney for the defendants.

The language of the publication is not actionable *per se*. *Colby* v. *Reynolds*, 6 Vt. 489; *Jones* v. *Roberts*, 73 Vt. 204; *St. J. Academy* v. *Gaiser*, 46 Am. St. Rep. 502.

If the language is not actionable *per se*, and the actionable quality arises from extrinsic facts and circumstances, there must be a prefatory averment of the facts, and the publication must be connected with these facts by an allegation. *York* v.

Johnson, 131 Mass. 482-5-6; *Darling* v. *Clement,* 69 Vt. 292-296; *Sheridan* v. *Sheridan,* 58 Vt. 504; *Merritt* v. *Dearth,* 48 Vt. 65; *Hoar* v. *Ward,* 47 Vt. 657; *Wing* v. *Wing,* 66 Me. 62; *Adams* v. *Stone,* 31 Mass. 433; *Thompson* v. *Lewiston Pub. Co.,* 39 Atl. Rep. 556.

Marvelle C. Webber for the plaintiff.

The words of the publication are susceptible of the meaning ascribed by the declaration, and it is for the jury to say whether the words were uttered in the sense alleged. *Jones* v. *Roberts,* 73 Vt. 201; *Darling* v. *Clement,* 69 Vt. 292; *Wilcox* v. *Moon,* 63 Vt. 481; *Sheridan* v. *Sheridan,* 58 Vt. 502; *Royce* v. *Maloney,* 58 Vt. 437; *Gregory* v. *Atkins,* 42 Vt. 237; *Nott* v. *Stoddard,* 38 Vt. 25; *Dickey* v. *Andros,* 32 Vt. 55; *Nichols* v. *Packard,* 16 Vt. 83.

HASELTON, J. This is an action for libel, and was heard in county court on demurrer to an amended declaration. The demurrer was overruled and the declaration adjudged sufficient. The defendants excepted, and the cause was thereupon passed to this Court before final judgment under the provisions of V. S. 1629.

Among the preliminary averments, the declaration sets out, with all requisite dates, that the plaintiff Cross was a ticket agent at Rutland in this State, that one Wilbert L. Lambson, was a married man and the husband of Fannie Louise Lambson, and that he had resided in Westfield in the State of Massachusetts, and that the defendants were the owners and publishers, and that one of them was the editor of the Brandon Union, a newspaper published at Brandon in Rutland County, and of general and extensive circulation throughout portions of Vermont, and throughout portions of Massachusetts and New York.

The declaration then charges, with the usual allegations as to motive, the publication and circulation by the defendants, in and through their said newspaper, of a false defamatory and libelous letter of and concerning the plaintiff, signed by the said Lambson. What is deemed the most significant portion of the publication charged is here quoted:

"Sometime over a year ago, I was working in the town of Southwick, Mass., seven miles from my home in Westfield. It was my custom to go by train to Southwick to do my work and return home several times during the week. On the 13th day of September, 1901, I left my home in the morning as usual and as I was about to go, my wife asked me for some money. I gave her a five-dollar bill and kissed her and my child good-bye, and went, as was my custom, to the train and my work. I did not return until Thursday, and when I arrived at my home, I found that my wife had gone and taken my child and some of the household furniture. I have not seen her since and did not see the child since until I recently found her. Upon investigation I learned that my wife was in Rutland, Vt., and that she was frequently seen in the company of one Cross, a ticket agent at Rutland, who by the way, kept company with my wife before I married her. Couple this fact with the circumstance that my little girl was found in the home of the mother of this man Cross at Brandon, and then read between the lines for a moment; and it is not hard for a person of ordinary intelligence to figure out the facts in the case."

The pleader, by innuendoes, explains that the publication imputes to the plaintiff the crime of adultery with the wife of said Lambson. We do not consider it necessary to analyze and dissect this publication line by line and sentence by sentence. The method of the writer is artful, oblique, and covert. But the matter of the publication is reasonably sus-

ceptible of the meaning attributed to it by the innuendoes. The portions of the publication set out in the declaration but not here quoted, do not, to say the least, affect favorably the character of what is above recited. It is urged that there may have been more than one ticket agent at Rutland by the name of Cross. This is possible, just as it is possible that there may be in the same city two or more persons of the same full name. But here the preliminary averments, the publication charged and the warrantable innuendoes are such that the declaration is good. A libel may be applied to a particular person although such person is not named therein, or although an initial alone is used, or although to determine the person intended it is necessary to "read between the lines," to borrow an expression from the publication in question. To hold otherwise would be to inaugurate a state of society in which calumny would be without adequate and salutary legal restraint.

The declaration, in its entirety, is such that the defendants, if they would meet it, must do so otherwise than by a demurrer.

The judgment of the County Court is affirmed and the cause is remanded.

TOWN OF SOUTH BURLINGTON *v.* TOWN OF CAMBRIDGE.

October Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, and HASELTON, JJ.

Opinion filed February 20, 1905.

Towns—Paupers—Liability for Support—Infant—Emancipation—Residence.

In an action by one town against another for the expenses incurred in the support of a pauper, it appeared that the pauper had not resided for three years in the defendant town after attaining his majority; that he never resided in any town for three years supporting himself, unless he so resided in the defendant town as an emancipated minor. He was born in the defendant town October 17, 1871. His father died in May, 1887, and the family kept together and resided in defendant town till September 1888, when his mother married, and thereafter lived with her second husband in defendant town till 1894. After said marriage the pauper supported himself and lived with his grandfather in defendant town till September, 1895. During this time he visited his mother's house occasionally, but she did not claim to exercise any control over his person or earnings, and he did not look to her for protection or advice, and he remained unmarried till September, 1895. In 1902, when he was about 31 years of age, he came to want in the plaintiff town and was assisted by the plaintiff. *Held*, that these facts failed to show emancipation of the pauper during his minority, and that, therefore, the defendant was not liable for his support by the plaintiff.

ASSUMPSIT for expenses incurred in the support of a pauper. Heard on agreed statement at the March Term, 1904, Chittenden County, *Munson*, J., presiding. Judgment for the plaintiff. The defendant excepted. The opinion states the case.

T. C. Cheney for the defendant.

The pauper was not emancipated during his minority. *Bradford* v. *Lunenburg*, 5 Vt. 481; *Wells* v. *Westhaven*, 5 Vt. 322; *Tunbridge* v. *Eden*, 39 Vt. 17; *Sumner* v. *Sebac*, 8 Me. 223; *Searsmont* v. *Thorndike*, 77 Me. 504; *Lowell* v. *Newport*, 66 Me. 78; *Rex* v. *Uckfield*, 5 M. & S. 214.

Theo. E. Hopkins, and *Brown & Taft* for the plaintiff.

The agreed statement shows that the pauper was emancipated. Emancipation may be inferred from facts and circumstances. Schouler on Domestic Relations, 368; 39 Me. 406; *Campbell* v. *Cooper*, 34 N. H. 49; 15 N. H. 489; *Lyon* v. *Bolling*, 14 Ala. 753; *Tillotson* v. *McCrillis*, 11 Vt. 477; *Benner* v. *Edgington*, 76 Iowa 105; *West Gardner* v. *Manchester*, 72 Me. 509; *Oldtown* v. *Falmouth*, 40 Me. 106; *Dennysville* v. *Trescott*, 30 Me. 470; *Lowell* v. *Newport*, 66 Me. 78; *Monroe* v. *Jackson*, 55 Me. 59; 31 Me. 124; 48 Me. 565; *St. George* v. *Deer Isle*, 3 Greenl. 390 (Me.); *Wells* v. *Kennebunk*, 8 Greenl. 200 (Me.); *McCarty* v. *Boston & Lowell R. R. Co.*, 2 L. R. A. 608 (Mass.); *Springfield* v. *Wilbraham*, 4 Mass. 493; *Nightingale* v. *Withington*, 15 Mass. 274; *Ream* v. *Watkins*, 27 Mo. 519; *Campbell* v. *Campbell*, 11 N. J. Eq. 272; *Everett* v. *Sherfey*, 1 Iowa 356; *Aulger* v. *Badgeley*, 29 Ill. App. 336; *Johnson* v. *Terry*, 34 Conn. 259; *Farrell* v. *Farrell*, 3 Hous. (Del.) 633; *Fairhurst* v. *Lewis*, 23 Ark. 435; *Chilson* v. *Philipps*, 1 Vt. 41; *Dierker* v. *Hess*, 54 Mo. 246.

HASELTON, J. This was an action in which the plaintiff sought to recover for expenses incurred in the support of a pauper, one James Perry. In county court the case was tried by the court on an agreed statement of facts, and judgment was rendered in favor of the plaintiff for $49.53, the amount of the expenses it had incurred in the support of the said

James after the notice which will hereinafter be referred to was given and received. Aside from the notice, the facts material to the question of liability are these:

James was born in Cambridge, October 17, 1871. His father died in May, 1887, and the family was kept together and resided in Cambridge until September, 1888, through the efforts of the mother, James and a younger brother. On the last named date, when, as will be seen, James was about 17 years of age, the mother married one Corrigan with whom she lived in Cambridge until 1894. After said marriage "James supported himself by working at odd jobs in the town of Cambridge," and lived with his grandfather until September, 1895. He, however, occasionally visited the Corrigans, but, to use here the exact language of the agreed statement, "his mother did not claim to exercise and did not exercise any authority or control over his person or earnings, and he did not look to her for protection or advice." It should be further stated that down to September, 1895, he was unmarried, and that he never resided in any town three full years supporting himself, unless he so resided in Cambridge.

Time went on, and in 1902, when James was about 31 years of age, he came to want in the town of South Burlington and was assisted by that town.

The first question is, did James reside three full years in the town of Cambridge, supporting himself. Living as he did apart from his surviving and re-married parent, the presumption is that he was emancipated on reaching the age of 21, if not before. No question is made that James resided in Cambridge from the time that he became twenty-one until September, 1895. But by reference to the dates given it will be seen that this period lacked a month or so of three full years. The question then is was James emancipated while a minor.

The pauper law has undergone a variety of modifications, but the true definition of "emancipation" has not been materially affected.

Upon and after the death of his father, James might have chosen a guardian, but the agreed statement does not show that he did. He was apparently content that the filial and parental relation should remain unsevered. He lived with his grandfather in the same town with his mother and was self-supporting, but under the circumstances, the fact that she did not claim his wages, and the fact that she did not assert a right to custody and control, do not, taken together, show or warrant the presumption of emancipation. There was, so far as all intendments are concerned, ever during his minority the gloved hand which indeed she did not lay upon him, but in respect to the exercise of which no right was relinquished, though no claim was in fact exercised. So far as the agreed statement of facts is concerned, the parental eye may well have been upon him throughout his minority, and the parental hand may have been ever ready to interpose in his behalf. Concede that the minor "shifted for himself," it does not appear that he was cast off and "left to shift for himself," or that there was any renunciation or abdication of parental duties.

It does not appear that any new relation, operating in itself as emancipation, was contracted by the minor. The case is the not uncommon one of stepchildren, whose course is what that of James was here, and towards whom the surviving parent conducts himself or herself with the restraint which was here exercised. But in view of the welfare of children and the good of society, and above all for the maintenance of the law as it has been from time to time declared, it must be held that the agreed statement of facts does not show emancipation during minority.

Emancipation before the age of majority leaves the emancipated person in an anomalous position under our law. He cannot make a valid will. He can avoid his contracts unless made for necessities. If he would sue, it must be by his next friend. If he is sued, he must have a guardian *ad litem* appointed to defend, at least, unless he is under a general guardianship.

Our conclusion is arrived at from a variety of legal considerations, from a review of such of our own cases as undertake to define "emancipation," and with due regard to cases reported from other states.

The remaining question relates to the sufficiency of the notice which, properly directed to the overseer of the poor of Cambridge and signed by the overseer of the poor of South Burlington, was this: "Mr. James Perry and family transient residents of this town is sick and without visible means of support. He has applied to me for assistance and I have relieved his necessities. I am informed that he has a residence in your town and shall expect your town to pay back to this town all money that we expend for them. This notice is given under the provisions of Chapter 144 of Vermont Statutes and the amendments thereto."

This notice is certainly crude. There seems to be some confusion between the tramp law and the pauper law. But, since the holding on the question of emancipation is determinative of the case, the sufficiency of the notice is not passed upon.

Judgment is reversed, and judgment is rendered for the defendant to recover its costs.

F. R. PATCH MANUFACTURING CO. *v.* PROTECTION LODGE NO. 215, I. A. OF M.

May Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

Opinion filed February 22, 1905.

Strikes—Boycott—Interference with Business—Conspiracy—Evidence—Motion for New Trial—Denial—Exception—Failure to File Statement of Facts.

In an action against a lodge of a machinists' union to recover damages for interfering with plaintiff's business by means of a strike, intimidation of workmen, boycott, etc., in pursuance of a conspiracy between the defendant and others, when there was some evidence of such conspiracy between the defendant and a carpenters' union, it was proper to allow plaintiff's president to testify that one of its employees, who was a member of the carpenters' union, told him that he had been ordered by his union to quit work, but that he would later withdraw from the union and return to work; it appearing that he did not withdraw from the union, but remained an active member, and that he had no personal grievance.

The fact that two written communications to the plaintiff relative to the demands of the defendant, and purporting to emanate from the defendant and from a "committee" of the defendant, bore the impress of the defendant's seal, was a circumstance proper for the jury to consider as tending to show that those papers emanated from the defendant, although it was not a corporation.

The fact that five of the ten members of defendant lodge whose names were signed to a written communication to the plaintiff relative to a settlement of defendant's demands, and purporting to emanate from a "committee" of the defendant, and bearing the impress of its seal, subsequently called upon the plaintiff in relation to the strike brought about by the defendant, was proper for the jury to consider in connection with the denial of these men that they signed the paper or were authorized by the defendant to sign it.

Many circulars relative to the strike of plaintiff's employees, which was ordered by the defendant, were posted and widely distributed.

These circulars bore the names of defendant's officers, and were obviously designed to prevent other workmen from entering plaintiff's employment. *Held*, that the jury might properly infer that the defendant promoted the distribution.

Every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, either before or afterwards in furtherance of the common design.

Any declarations made by one conspirator, pursuant to the common object and in furtherance of it, are admissible against all, when the combination is once established.

The plaintiff may first either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy.

There being some evidence to show the alleged conspiracy, and that a certain man had been hired by a committee of the defendant to prevent men from entering plaintiff's employment, evidence that this man used violence to prevent a man going to work, and that when admonished he said, "Hell with your injunction; do your worst," is admissible.

Testimony of a witness that he went out on the strike ordered by the defendant, and went to a hall used by the defendant, accompanied by one of defendant's members, who promised him money and board if he would strike, was properly admitted, there being some evidence tending to show the alleged conspiracy between the defendant and the union to which the witness belonged.

Testimony of a witness who was secretary of a council composed of delegates from various labor organizations, including the defendant, that he told a plumber, who was plumbing a house in which plaintiff intended to board its employees, that the union was anxious to bother the people who were coming to work for the plaintiff and see if they could induce them to go back and not work, and that he asked the plumber not to complete the job, was admissible, there being some evidence of the conspiracy alleged.

Since all the evidence received on behalf of the plaintiff had some tendency to prove the conspiracy charged and ultimately became pertinent to that issue, there can be no complaint as to the order of proof.

A request to charge that plaintiff could not recover for expenses incurred in securing other workmen to take the positions of the

men who left plaintiff's employment was properly refused, as ignoring the question whether these men were hindered from entering the plaintiff's employment by coercion or intimidation on the part of defendant or of those with whom it was in conspiracy.

A request to charge that any threat made by the defendant, or by any one associated with it, to boycott any boarding house keeper who entertained, or any merchant who supplied with the necessities of life, workmen in the employ of the plaintiff, if made directly and exclusively to such boarding house keeper or merchant, was not an interference with the rights of plaintiff, was properly refused.

When a judge drops a word or expression, in the course of a long charge, so contrary to its whole theory and so plainly error as to force the impression of inadvertence, it is the duty of counsel to call attention to it, and not let it pass in reliance upon a general exception in the event of an adverse verdict.

Although a charge may contain some expressions which, taken alone, would be error, yet if, as a whole, it is sound, and there is no fair ground to say that the jury has been misled, it ought to stand.

Plaintiff requested the court to charge that, if the jury find the conspiracy charged, and that labor unions in the conspiracy concealed their records, the jury might find the "facts" charged in the declaration established by the presumption arising from the suppression of the records of a co-conspirator, and the requested instruction was given except that the word "damages" was used instead of the word "facts." *Held*, that it was the duty of counsel to have called the attention of the court to this change, that an exception to the compliance with the request did not reserve that question; and that this evidently inadvertent change could not have harmed the defendant, the court having instructed that the burden of proof was on plaintiff, and that the mere fact that its men struck, and plaintiff thereby suffered damage, did not entitle plaintiff to recover.

The fact of a common design existing between the different associations with whom the defendant is alleged to have conspired, makes the records of the other associations the records of the defendant, provided the conspiracy is established.

In the instruction that if defendant, having been notified to produce books and papers, failed to do so, the jury would have a right to presume that it was because the books and papers, if produced,

would operate against its claim and in favor of plaintiff's claim, the word "failed" is equivalent to the word "refused."

The presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden.

The court charged that if the defendant had books which it suppressed, and which it failed to produce after having been notified to do so, the jury might "find or presume that the claim of the plaintiff is true, and that the claim of the defendant is false." *Held*, that this did not amount to an instruction that, if the jury found that the books had been suppressed, they might presume, without other proof, that such books contained evidence of a conspiracy, the court having immediately thereafter explained what the claims of the parties were—the plaintiff's, that there had been coercion and intimidation resulting in damages; the defendant's, that it had only advised, but did not attempt to interfere with the free choice and judgment of the workmen.

When, on a motion to set aside a verdict because of the misconduct of a juror, the county court heard testimony on both sides, denied the motion, but filed no statement of facts, the question cannot be reviewed on exception.

CASE. Plea, the general issue. Trial by jury at the March Term, 1903, Rutland County, *Haselton*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. After verdict and before judgment thereon the defendant filed a motion that the verdict be set aside and a new trial granted because of the misconduct of a juror during the trial. The court heard testimony on both sides and denied the motion, to which the defendant excepted. But the court filed no statement of facts found.

The defendant is an unincorporated association. Service was made under V. S. 1099, which provides that such an association consisting of five or more persons, and having a president or other principal officer, a clerk or treasurer, may sue or be sued in its associate name; and that service of process against such association made upon either of such officers

shall have the same force and effect as if served upon all the associates.

V. S. 1183 provides that, if execution obtained on a judgment against such association is returned unsatisfied in whole or in part, a suit for the amount unpaid may be brought against any of the associates.

Peter F. McManus, Thomas H. Browne, and *James K. Batchelder* for the defendant.

The talk between Patch and the committee of five was inadmissible. It did not tend to show any conspiracy between the lodge and its members. *Com.* v. *Smith,* 168 Mass. 130; *Com.* v. *Scott,* 123 Mass. 222; *Com.* v. *Smith,* 163 Mass. 418.

The court erred in its charge as to force of the presumption arising from the suppression of defendant's books. The court, in effect, ordered a verdict for the plaintiff. The true rule as to this presumption may be seen from the following authorities. In Best on Presumptions § 148; *Saltern* v. *Malhuish, Amb.* Chancery Report, 247; *Lawson* v. *Sherwood,* 1 Starkie Rep. 251; *Braithwaite* v. *Coleman,* 1 Har. 229; *Bott* v. *Wood,* 56 Miss. 136; *Cooper* v. *Gibbons,* 3 Campb. 363; *Thompson* v. *Thompson,* 9 Ind. 323; *Life Ins. Co.* v. *The Mechanic Fire Co. of New York,* 7 Wend. 31; *Southern Pac. Co.* v. *Johnson,* 69 Fed. 559; *Rector* v. *Rector,* 8 Ill. 105; *The Attorney General* v. *Le Merchant,* 2 Term Rep. 201; *Hanson* v. *Eustace,* 2 How. 653-708; *Spring Garden Mutual Ins. Co.* v. *Evans,* 9 Md. 1 and 17; *Connell* v. *McLoughlin,* 28 Or. 230, 42 Pac. Rep. 218; *Bechmeyer* v. *Ins. Co.,* 87 Wis. 325, 58 N. W. 403; *Chaffee* v. *U. S.* 18 Wall. 516; Lawson on Presumptive Evidence 180, R. 23; *Askew* v. *Odenheimer,* 1 Baldw. 390; *Bott* v. *Wood,* 56 Miss. 136; *Cowper* v. *Cowper,* 2 P. Williams 748; Lawson on Presumptive Ev. 195-6, R. 25.

The plaintiff could not recover for any threat made by defendant directly and exclusively to any merchant or boarding house keeper. *Williams* v. *Vanderbilt,* 28 N. Y. 217; *Lamb* v. *Stone,* 11 Pick. 526; *Anthony* v. *Staid, et ux.* 11 Met. 290; *Piper* v. *Kingsbury,* 48 Vt. 480; *Luce* v. *Hoisington,* 56 Vt. 436; *Dennis* v. *Stoughton,* 55 Vt. 371; *Bovee* v. *Danville,* 53 Vt. 183; *Boutwell* v. *Marr,* 71 Vt. 1; *Protection Ass'n* v. *Cumming,* 170 N. Y. 314.

Joel C. Baker, Orion M. Barber and *Marvelle C. Webber* for the plaintiff.

It is a conspiracy for two or more persons to combine to injure another's business. *State* v. *Glidden,* 55 Conn. 46, 71; *Boutwell* v. *Marr,* 71 Vt. 1, 8; *Christensen* v. *People,* Chicago Legal News, Vol. 36, No. 40, (1904) *U. S.* v. *Sweeney,* 95 Fed. R. 434; *The Glamorgan Coal Co. et al* v. *The South &c., Federation,* 19 Times Law Rep. 701; *Giblan* v. *The National &c., Union,* 19 Times Law Rep. 708; *Arthur* v. *Oaks,* 63 Fed. R. 310; *Doremus* v. *Hennessy,* 176 Ill. 608; *Haywarden* v. *The Younghiogheny &c., Co.,* 111 Wis. 545; *Barr* v. *Essex Trades Council,* 53 N. J. Eq., 101; *Quinn* v. *Leathem,* L. R., App. Cas., 495, 506.

Everything said, done, or written by any one of the conspirators in furtherance of the common purpose, including the suppression of books or other evidence, is a relative fact against each of them. Stephens Dig. of Ev. (New Eng. Ed.) Art. 4; *State of Vermont* v. *Thibeau,* 30 Vt. 100; *Jenne* v. *Joslyn,* 41 Vt. 478; *State* v. *Glidden,* 55 Conn. 46, 79; *State* v. *Dyer,* 67 Vt. 690, 702; *People* v. *Mather,* 4 Wend. 229, 260.

In proving a conspiracy, slight evidence of collusion is all that is required. *Brenham* v. *Carey,* 11 Wend. 83; *Crary* v. *Sprague,* 12 Wend. 41; *Kelley* v. *People,* 55 N. Y. 566; *Spies* v. *People,* 122 Ill. 1.

It is for the jury to determine what inferences are to be drawn from the failure of a party who has books and records, to produce them after notice to do so, without showing good cause therefor. 1 Jones on Ev. § § 17, 18; 2 Wharton Ev., § § 1266, 1268; *Jackson* v. *M'Vey,* 18 Johns. 330, 334; *Life etc. Ins. Co.* v. *The Mechanic Fire Ins. Co.,* 7 Wend. 31, 34; *Thayer* v. *Middlesex Fire Ins. Co.,* 10 Pick. 326, 329, 330; *Hanson* v. *Eustace's Lessee,* 2 How. (U. S.) 653, 708; *Clifton* v. *U. S.,* 4 How, 242, 246; *Barton* v. *Lyon,* 22 Barb. (N. Y.) 622; *Bleecker* v. *Johnson,* 69 N. Y. 309, 311; *Eldridge* v. *Hawley,* 115 Mass. 410, 412; *Arbuckle* v. *Templeton,* 65 Vt. 205, 211.

But where books and records have been called for, and ordered to be produced, and they are not produced, but are hidden, carried away, or destroyed by the defendant or its co-conspirators, then the rule is *omnia praesumuntur contra spoliatorem.* 1 Jones Ev. § 16; 1 Greenleaf Ev. § 37 and 195c; Best Ev. 413; *Bleecker* v. *Johnston,* 69 N. Y. 309, 311; *Armory* v. *Delamirie,* 1 Smith's Lead. Cas. 636; *White* v. *Lincoln,* 8 Ves. 983; *Roe* v. *Harway,* 4 Burr. 2484; *Holden* v. *Harney,* 4 Burr. 2487; *Attorney General* v. *Windsor,* 24 Beav. 679; *Crisp* v. *Anderson,* 1 Stark. 35; *Davie* v. *Jones,* 68 Me. 393; *Paige* v. *Stephens,* 23 Mich. 357; *Thompson* v. *Thompson,* 9 Ind. 323; s. c. 68 Am. Dec. 638; *Riggs* v. *Penn. & N. E. R. Co.,* 16 Fed. 804; *Blade* v. *Noland,* 12 Wend. 173, s. c. 27 Am. Dec. 126 and note; *Joannes* v. *Bennett,* 5 Allen 169; The Olinde Rodrigues, 91 Fed. 274, 284, s. c. 174 U. S. 510, 528.

TYLER, J. This is an action on the case brought by the plaintiff, a corporation, against the defendant, a partnership and unincorporated association consisting of more than five members and having a president, secretary, clerk and treasurer, to recover damages for the defendant's alleged unlawful

acts of interference with the plaintiff in the prosecution of its business.

It appeared that the plaintiff, prior to the acts complained of, was a manufacturing corporation duly organized under the laws of this State, located and doing business in the city of Rutland; that its business was the manufacture of machinery for mills and stone work of all kinds, also of various other kinds of machinery and engines, and it carried supplies for steam fitters and mills in this and other countries; that it had erected an expensive and valuable plant with adequate power, and employed about one hundred skilled machinists, also moulders and other workmen; that it had a large amount of capital invested in its business which was carried on at a profit, and that at the time of the alleged wrongful acts of the defendant it had contracts on hand with customers to furnish them its goods at a profit when manufactured.

The defendant association was composed of machinists, many of whom were employed in the mills and shops of the plaintiff, and the plaintiff claimed that the defendant conspired with its members and with other labor organizations in Rutland and vicinity to force the plaintiff to adopt a schedule of hours of labor by which nine hours should constitute a day's work, and to increase the wages of its workmen so that the plaintiff could not do business at a profit nor complete its contracts except at a loss; that the plaintiff refused to comply with this demand, and that thereupon, on May 20, 1902, the machinists, at the order and direction of the defendant, quit their work and conspired and confederated together and with divers other persons unknown to the plaintiff, to oppress the plaintiff and force it to accede to their illegal demands, and by threats, intimidations, bribery and violence sought to intimidate and drive away the other workmen of the plaintiff, and detailed pickets, spies and watchmen to stand guard about

and near the plaintiff's works and prevent other workmen taking employment therein; that they intercepted and prevented, by threats, bribes and violence, other men whom the plaintiff had employed and who were on their way to Rutland, from engaging in the plaintiff's service; and that in carrying out their conspiracy, by threats and intimidations, they caused a large number of workmen whom the plaintiff had employed and who had entered upon its service to quit its service; that the defendant and its co-conspirators visited the keepers of boarding-houses and merchants, and by threats to boycott and injure their business induced and coerced them to refuse to board and entertain and to sell goods and necessaries to such workmen; that they made attacks upon boarding-houses where the workmen were boarded, and attacked, assaulted and annoyed them on the streets and at their boarding-houses and thereby drove away from the plaintiff's employment large numbers of such workmen, all which conduct injured the plaintiff in its business.

The defendant denied the conspiracy alleged and claimed that whatever was done by it and the other associations was, through a lawful combination among them, to effect by lawful means the lawful purpose of forcing the plaintiff to lessen the hours of labor and increase the wages of workmen.

No question was made in the court below in respect to the sufficiency of the declaration, therefore it cannot be considered here.

The plaintiff offered evidence tending to establish all the material allegations in the declaration, most of which was received under the defendant's exception. The defendant relies upon seven exceptions to the admission of evidence.

I. The testimony of Patch about the visit of a committee, and what they said to him; the admission of plaintiff's exhibits 1 and 2 and all that Patch testified to upon the sub-

jects to which they related, and especially to all that the committee said to him upon that occasion. This exception was taken upon the ground that it was not shown that the committee was a committee of the defendant:

2. To the testimony in respect to the threats and acts of McDonald:

3. About the distribution and posting of exhibits 4 and 5, called "stickers:"

4. The testimony of Alexander Sanchegrin on the ground that there was no proof that Page was a member of defendant lodge, nor that E. A. U. Hall was used exclusively by that lodge:

5. As to all testimony in respect to the acts of Pennington and others relating to a boycott:

6. To the testimony relating to the acts of Young and Hines:

7. To all testimony respecting the conduct of Martin for the same reason.

All these exceptions were upon the ground that if the various acts testified to were in fact committed, the plaintiff had failed to show that the defendant directed or sanctioned them, or was in any way responsible for them; that these acts, if committed, were upon the motion alone of the plaintiff's striking employees for the purpose of shortening time and increasing wages, and that these acts did not emanate from the defendant lodge nor any of the other lodges mentioned, and were not evidence of the conspiracy alleged.

1. The plaintiff's evidence tended to show that, being engaged in business as alleged, on May 11, 1902, it received a written communication which reads: [Plaintiff's exhibit 2.] "International Association of Machinists.

Rutland, Vt., May 11, 1902.

To the Patch Manufacturing Co.,

Gentlemen:—Representing the machinists employed in your shop, we respectfully request that you establish the following conditions in the Patch Manufacturing works:

1. Fifty-four hours to constitute a week's work. Any time over this to be considered overtime and to be paid for at the rate of time and one-half:

2. That the company recognize the union and union principles.

In explanation we would say that we must be governed by the Grand Lodge I. A. M., and to hold our charter and remain union men we are forced to ask recognition. We further call your attention to the fact that only union work goes in many places and we have to endorse your product as fair. If we do so longer, we feel that we must receive the benefits.

If the capacity of shops is insufficient we suggest that our union men will always be glad to help out any situation by working evenings or to help out the same as at present.

We mean by recognition of the union the meeting of shop committee to settle any differences on the same plan as moulders. Will be pleased to receive your reply on or before Wednesday night, May 14, addressed to Protection Lodge No. 215, Rutland, Vt.

(Seal of Protection Lodge.)"

The plaintiff's evidence also tended to show that on May 20 a large number of the plaintiff's machinists and other workmen struck and left its employment, and that a few hours later on that day F. R. Patch, who was the plaintiff's president and general manager, found upon his desk a written communication stating that the committee of Protection Lodge No. 215, I. A. of M. would meet at the E. A. U. Hall at 3 P. M. that day, and that any communication would be re-

spectfully considered. This paper had upon it an impress of the seal of the defendant lodge and had appended the names of ten men, five of them purporting to be those of J. A. Keenan, N. J. Howley, J. E. Capeless, J. P. Hinchey and M. H. McLaughlin, five of the machinists who had struck and who were afterwards shown to have been at that time members of the defendant lodge; that these five men afterwards called upon Mr. Patch for an answer, but made no reference to either of said papers, and the defendant's testimony tended to show that these five men never signed, authorized or knew of the last named paper.

The plaintiff's evidence tended to show that the defendant and some or all of its members confederated together and with other lodges of other classes of workmen and the members thereof, and in like manner drove away from the plaintiff's service workmen of the plaintiff who did not strike and leave the plaintiff's service on May 20th and other workmen whom the plaintiff had since that time employed.

Among the specific acts that the plaintiff's evidence tended to show were committed by the alleged conspirators were that they detailed pickets and special watchmen to watch the railroad station for the arrival of men, to patrol the streets of Rutland, to stand guard about the plaintiff's works to prevent other workmen from taking employment therein; that they sent out spies and watchmen upon the roads and railroads leading to Rutland and intercepted men who were on their way to enter the plaintiff's service, and by threats, bribes and promises in many cases prevented such men from entering the plaintiff's service; and that the defendant also combined and confederated with other persons unknown to the plaintiff to do and in doing the acts alleged.

That after the strike was on the defendant appointed Walter Newton and John E. Capeless, two of its members, to

conduct the strike, and that they employed one Martin to assist them. The testimony of the defendant's recording secretary tended to show this fact.

The plaintiff's evidence tended to show that Martin was active in intercepting men who were on the trains and public roads going to Rutland to take the places of men who had left the plaintiff's employment, and by promises, threats, intimidation and personal violence he tried to turn them back and prevent their engaging in its service, and in some cases he succeeded in so doing.

There were other lodges of workmen in Rutland with numerous members, and some of the members of some of these lodges were in the plaintiff's employment.

The plaintiff's testimony tended to show that by reason of the wrongful acts of the defendant it was unable to complete its contracts and take others and was injured in its business.

Mr. Patch testified, under defendant's objection and exception, that on September 23rd eight new employees arrived, when he heard a disturbance at the entrance to the plaintiff's works, went out and saw a large mob, and that one Vincent, who was then in the plaintiff's employment, was being roughly handled by McDonald, a man who had been in the plaintiff's employment until the strike; that the witness warned McDonald that he was violating the injunction and that the latter replied: "Hell with your injunction; do your worst;" that McDonald made threats to Vincent if he returned to work. The plaintiff did not show, nor did any testimony in the case tend to show that McDonald was a member of Lodge 215, or had any connection whatever with the strikes, or that any of the strikers or any of the members of the lodge, or anybody connected with the claimed conspiracy, approved of what he said or did, excepting so far as his acts

above set forth tend to show these things; and excepting, also, so far as such testimony may be presumed as tending to show these facts from the failure of the defendant to produce its books and records and lists of membership. The plaintiff claimed that the defendant's books and records and lists of membership, called for and ordered to be produced and not produced, would have shown all these facts.

This incident was only one of many incidents introduced by the plaintiff tending to show intimidation and interference with the plaintiff's workmen and with men brought to Rutland by its agents for the purpose of filling the places of the strikers. The testimony in many of the other incidents tended to show that such intimidation and enticement of and interference with the plaintiff's workmen and men seeking its employment, were done by members of the defendant lodge, its agents and co-conspirators; and much evidence of that class was admitted without objection.

The issuing of plaintiff's exhibits 4 and 5 were not shown to have been done directly by the defendant. Witnesses testified to having seen the circulars in the office of the machinists, which was the headquarters of that class of workmen when they were out of employment, and these circulars were sent to the different machinists' offices throughout the country. They were admitted under defendant's exception and are:

Plaintiff's exhibit 4. "Rutland, Vt., May 20, 1902.

TROUBLE IN RUTLAND.

We have been on strike since May 20th, and we are obliged to continue the fight to the end:

Therefore, This is to apprise all Machinists and Helpers, Metal Workers, Blacksmiths and others that their fellow toilers in Rutland, Vermont, are on a strike against the unreasonable refusal of the Lincoln Iron Works and F. R.

Patch Mfg. Co., to accede to the request for a fair adjustment of time and pay.

(Typographical Union label, Rutland, Vt.)"

Plaintiff's exhibit 5.

"Rutland, Vermont, September 1, 1902.

Trouble in Rutland since May 20, 1902.

This is to notify Machinists, Molders, Metal Workers, Blacksmiths, and others, that

The strike is still on

at the F. R. Patch Mfg. Co., and Lincoln Iron Works, and will be kept on until we get a fair adjustment of our demands.

(Typographical Union label, Rutland, Vt.)"

The plaintiff claimed, and introduced testimony tending to show, that money was paid by the defendant and by its individual members to induce men to leave the employment of the plaintiff, during the strike, which continued several months, and to keep men from entering its employment, and introduced as a witness Alexander Sanchegrin who testified that he went out with the men on the strike and then went to the E. A. U. Hall in company with Howley, and under the defendant's exception testified that Howley promised him six dollars a week and his board if he would go out and that he received fifty cents; that Howley got the money from Page. There was no proof that Page was a member of defendant lodge, nor of any other lodge, nor that he was connected with the strike, excepting that the plaintiff's testimony tended to show that Page was then in said hall with Howley, and whatever presumption might arise that Page was a member of defendant lodge and a conspirator with the defendant from the failure of the defendant to produce its books, records and list of membership. It appeared that this hall was not used exclusively by said lodge nor controlled by it, that it belonged to a third party, that this and various associations

held meetings in it, that the defendant used it as a lodge room, and that it was used for various purposes before and during the strike. The plaintiff claimed that the records would have shown that Page was a co-conspirator with the defendant.

The plaintiff's evidence tended to show that after the strike was on, Walter Newton, who was a member of defendant lodge, and one Pennington, who was a member of the Retail Clerks' Protective Association and at that time secretary of the Central Trades and Labor Council, interviewed a firm that was engaged in the plumbing business and was then plumbing a boarding-house which the plaintiff was repairing for the purpose of boarding its workmen therein, and by threats and intimidations tried to induce said firm not to do such plumbing, and that this was done to prevent the plaintiff from providing a place for boarding and lodging its workmen and thus prevent it from obtaining them.

The testimony as to Pennington's acts stands upon the same ground as Newton's. He went with Newton to visit the plumbers, as before stated, but it was not shown that either went by the procurement or knowledge of the defendant nor of any other lodge, but for anything that appeared, of their own motion, excepting that Newton was a member of defendant lodge, a member of the strike committee appointed by the defendant and a delegate to the Central Trades and Labor Council, and that Pennington was then a member of and secretary of that Council.

Pennington testified that during the summer of 1902 he was secretary of the Council which was composed of three delegates from each one of the several unions in Rutland and vicinity; that Protection Lodge No. 215 was one of these unions at the time he was secretary, and that Walter Newton was at one time a delegate to the Council. Pennington's testimony tended to show that the matter of the strike was

brought up more than once at the meeting of the Council in the summer of 1902 by the delegates from defendant lodge; that they explained the situation and the different delegates talked it over, and that he signed the plaintiff's exhibit No. 3, "Central Trades and Labor Council, C. W. Pennington, secretary," but could not say whether he signed it for the Council or not. In cross-examination he said he had no authority to sign it, and that so far as he knew the Council never authorized, sanctioned or indorsed his action in signing it, and that it was never to his knowledge brought to the attention of the Council. The plaintiff claimed that the books and records of the Council called for and not produced would have shown, had they been produced, that he signed said exhibit by the authority of the Council, and that the Council authorized, sanctioned, and indorsed it. The plaintiff also claimed that the books and records of the defendant would have shown that the authorization and approval were at its request and in furtherance of the plans of conspiracy; and, under the defendant's exception, Pennington was allowed to testify, among other things, that he told Loveland that the union was anxious to bother, in a certain way, the people who were coming there to work for the plaintiff, make it a little unpleasant for them without violence, and see if they couldn't get them to go back and not work, and that he asked Loveland not to complete the job of plumbing. Pennington testified that he and Newton told Loveland that if the report were circulated that he was doing this work, possibly he would lose some individual trade he was getting at that time; that this was their opinion in the matter.

The plaintiff's evidence tended to show that Tilly C. Young was a member of the Carpenters' Union, and until the 1st of July, 1902, its secretary; that Hines was in the plaintiff's employment, and was also a member of that union, and

that they requested a private meeting with Patch; that they told him they had been ordered by their union to quit work that night, under a penalty of a fine of five dollars a day; that they were being watched by delegates from that Union and asked Patch's advice, which being refused, Young said he should go out, withdraw from the Union and then return to work if Patch would allow it; that Hines said he would stay and Young said he would go out and went. Patch was allowed to testify, under defendant's exception, that he told Young that he would keep his place for him if he returned. Neither Young nor Hines were members of defendant lodge, but were members of the Carpenters' Union.

The testimony of Patch as to his interview with Young, a member and the secretary of the Carpenters' Union, was properly admitted for the purpose for which it was offered. The plaintiff had introduced evidence tending to show a conspiracy with the defendant on the part of the Carpenters' Union. It is true that neither the defendant nor the Union could be affected by Young's declarations, which were not in furtherance of the common design, or did not accompany and explain an act then being done by him in such furtherance; but mere words may be an act, as were the shouts of the mob in *Lord Gordon's* case, 21 How. St. Tr. 535, and the conversation among conspirators in *Lord Stafford's* case, 7 St. Tr. 1218, and in *State* v. *Glidden,* 55 Conn. 46, 82. So a letter may be an act, though never sent, as in Hardy's case, 24 State Trials, 199, 475. But here was a physical act being done by Young which his declarations accompanied and tended to explain, namely, his striking work at the plaintiff's plant. It is argued that the fact that he then arranged with Patch to come back as soon as his secretaryship expired, and he could legally withdraw from the Union, showed that his leaving was not in furtherance of the conspiracy but for his own benefit, and

against the interest of the conspirators. But he went out at the call of his Union having no grievance of his own. He did not return, and Patch never met him again. He did not withdraw from the Union, but remained in it and was re-elected secretary six months afterwards, held the office until the trial, and as secretary executed votes and orders of the Union in respect to the strike. He conducted in such a manner as a witness, when called by the plaintiff to produce the books and records of the Union and in disobeying the subpoena served on him for that purpose, that he was ordered into custody and required to show cause why he did not obey the subpoena. He was told that when his examination was completed the court might be satisfied that he did not intend to perjure himself, but whether the court became thus satisfied does not appear. The evidence and the proceedings shown by the transcript, which is referred to for all purposes relevant to the exceptions taken, fully justify the inference, if indeed they do not force the conclusion, that Young struck with no intention of returning, and that his arrangement with Patch was a mere pretext to conceal the real purpose of his going out; all which justifies the further inference that he was acting in connection with the conspirators in furtherance of a common purpose. His act and declarations, therefore, viewed in this light, as the jury had a right to view them, concurring as they did with the acts of the defendant and of the Union in point of time and in adaptation to accomplish the same object, tended to make Young a conspirator with both of them, and consequently were admissible.

It appeared that the defendant sent delegates to the Council, and the evidence tended to show that at different times these delegates brought up the subject of the strike in the Council and explained the situation; that the matter was talked over among the different delegates, but that it did not appear

that any action was taken by the Council except that the plaintiff's evidence tended to show that Jones and Stockwell, who had interviewed the Combination Cash Store people, represented themselves as a committee from said Council for the purpose of boycotting the store.

That members of the Plumbers' Union, of the Central Trades and Labor Council, and of the Carpenters' Union, who were claimed to be co-conspirators with the defendant, visited the store and tried to induce its officers to refuse to sell goods to the plaintiff's workmen who had refused to strike, and to other workmen who had been employed.

The plaintiff claimed that exhibit 3 tended to show the conspiracy between the defendant and its members, said Council and the Carpenters' Union and their members, and that the books and records would have shown such conspiracy. Pennington testified that he had no authority for signing exhibit 3; that there was no action of the Council authorizing him to sign it; that the Council never sanctioned it; that it was presented to him for signature; that he signed it without reading it, and that he thought it was a paper that should be signed. The plaintiff claimed that the books and records would have shown authority from the Council to Pennington to sign said exhibit which reads:

"Notice to Union Men.

Rutland, Vt., Oct. 10, 1902.

To Organized Labor, Everywhere.

Greeting: The F. R. Patch Mfg. Co. and Lincoln Iron Works are on the unfair list, having been placed there by the General Executive Board of the International Association of Machinists, and also by the International Association of Marble Workers at their convention held in Detroit, Mich., June 23 and 24, 1902. The above named firms are members

of an association composed of the leading machine and marble manufacturers of this vicinity, who have been and are now discriminating against members of the Union, whose avowed purpose is to crush the labor organizations of this vicinity. We have been on strike since the 20th of last May for the nine-hour day and just treatment for Union men. There are associated with us in this strike the Iron Moulders, Carpenters, Blacksmiths and Federation of Labor, who are standing true to their demand for fair treatment. Both firms are doing a limited amount of work with a class of help familiarly known as "scabs." Can you not see your way clear to give us some measure of assistance, other than in a financial way?

Trusting that you will do what you can to help us and extending to you our heartfelt gratitude for anything you may do, we remain,

Fraternally Yours."

To the above paper were appended, in type writing, the names of six local associations with the names of their respective presidents and secretaries, the defendant's heading the list, and in like manner the "Central Trades and Labor Council, C. W. Pennington, secretary," closing with the words: "Typographical Union Label, Rutland, Vt."

A considerable amount of testimony was introduced by the plaintiff, under the defendant's exception, tending to show various acts of intimidation by Martin to men who remained in the plaintiff's employment, and to new men who had been employed, and that he was active in the distribution of exhibit 3. The testimony of Tait, the defendant's secretary, tended to show that Martin was in Rutland in the summer of 1902 and was employed by, or at least acting for, the union in relation to the strike; that he was helping to keep men from working at the shops; that he was employed by Capeless and Newton, who were a committee of defendant lodge, and

that Martin was not a member of the lodge. The plaintiff claimed that the books and records would have shown that Martin was employed by the defendant to help conduct the strike, and the defendant claimed the contrary,—that he was not a member of defendant lodge, nor an employee of any committee of the lodge, and denied that the defendant appointed or authorized any committee to conduct the strike.

The rule of law that a person cannot prove his claimed agency by his own declarations does not apply to this case. The question is whether the plaintiff's evidence tended to show the conspiracy alleged.

To review the evidence briefly: The defendant was a local protection lodge of the International Association of Machinists, and it may be assumed that it was organized for the protection of the interests of its members who were machinists, a part of whom were in the plaintiff's employment. A strike from the Lincoln Iron Works, a corporation engaged in the same business as the plaintiff's, was made at the same time and by the same classes of workmen. The matter of the strike was brought up more than once at the meetings of the Council in the summer of 1902 by delegates from defendant lodge, who discussed and explained the situation. On May 11 the plaintiff received exhibit 2; on May 20 came the strike, and three hours later the plaintiff received exhibit 1. Both these papers bore the impress of the seal of the defendant. It is of no importance that it was not a corporation and that the seal was not a corporate seal. Its impress upon these papers was a circumstance proper to be considered with other evidence in the case tending to show that "The Committee" was a committee of the defendant, and that these papers emanated from it. The ten men who signed the second paper were all members of the lodge. Sheldon, who was one of the ten signers, procured type written copies of it to be made. That five of

these signers called upon the plaintiff's president two days later, one of their number saying to him that they thought he would like to see a committee, that they had come for an answer, and then making their demand, are facts that were proper for the jury to consider in connection with the denial of these men that they signed the paper or were authorized by the defendant to sign it.

The printed "stickers" were widely circulated in and about Rutland and in New York City, and exhibits 4 and 5, if not exhibit 3, were sent to the different machinists' lodges through the country for the obvious purpose of preventing other workmen from entering the plaintiff's employment while the strike was on.

It must have been common knowledge in Rutland that these great strikes were on, that the strikers were trying to prevent new men from entering the plaintiff's works, and that these circulars were distributed for that purpose. It is not conceivable that the defendant's officers could have been ignorant of these proceedings. The name of J. F. Tait, recording secretary, was appended to the circulars under that of C. F. Nourse as the defendant's president, and the jury might have inferred that the defendant directly or indirectly promoted the distribution of the circulars.

The evidence relative to the acts of Martin and McDonald tends as remotely as any evidence in the case to show that the defendant was a conspirator in the strike; yet secretary Tait testified that Martin, though not a union man, was employed by a committee and helping to prevent men from coming to work at the shops. The witness said, "not employed by the lodge particularly," but "by the committee."

McDonald had been in the plaintiff's employment until the strike. There was no evidence that he was a member of defendant lodge nor that he was employed by any one to

commit acts of violence; but, on the occasion testified to, there were present with McDonald, near the plaintiff's works, a crowd of about two hundred men, and some of the plaintiff's workmen were being detained by men in the crowd, and McDonald laid hold of one workman, threatened him and tried to draw him away. McDonald's acts and declarations alone were not admissible as tending to show the conspiracy alleged in the declaration, but if the other evidence in the case tended to show it, then his acts were properly shown as an incident in it, like evidence tending to show that the plaintiff's works were picketed by men unknown to the plaintiff's officers for the purpose of preventing new men entering the shops until the plaintiff had yielded to the demand for fewer hours of labor.

The testimony as to the doings of the mob on this occasion was received without objection, and this incident was only one of many introduced by the plaintiff tending to show intimidation of, and interference with, the plaintiff's workmen and men brought to Rutland by its agents for the purpose of filling the places of the strikers.

The testimony as to many of the other incidents referred to tended to show that the acts of intimidation and interference were committed by members of the defendant lodge and its agents and co-conspirators. Since these various incidents were concurrent in point of time, within the meaning of the law, and alike in adaptation to accomplish the general design of the conspiracy, they were all admissible as evidence tending to show that the participators were co-conspirators. The acts and declarations of McDonald at the time show that he understood the purpose of the mob and participated therein; hence the evidence tended to show that he was a co-conspirator, and there was no error in its admission. The authorities before referred to are full in support of this holding.

If McDonald engaged voluntarily in these unlawful acts; if he joined in with others to aid in the scheme, he became a co-conspirator, and the defendant was responsible for his acts, provided it were shown that the defendant was a conspirator with others, for the reason that McDonald's acts were in furtherance of the original design. "If a general conspiracy exists, you may go into general evidence of its nature and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it years after those terms have been established and who reside at a great distance from the place where the general plan is carried on. It is held that all who accede to a conspiracy after its formation and while it is being executed, become co-conspirators." * * *; also that if parties concur in doing the act, although they were not previously acquainted with each other, it is a conspiracy. See *King* v. *Hammond & Webb,* 2 Esp. Cas. 719.

The following extract from the opinion in *Spies* v. *People,* 122 Ill., 1, 3 Am. St. Rep., 320, is in point: "Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of the concoction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design." 3 Greenl. Ev. § 93.

One to be chargeable need not have been an original contriver of the mischief; for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is required of an agreement to concur. 2 Bish. New Crim. Law, § 190; 3 Chit. Crim. Law, § 1141, 1143; *People* v. *Mather,* 4 Wend. 229.

Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the

means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.

"The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Roscoe's Crim. Ev., 7th Ed., 415." See also *Stewart* v. *Johnson,* 18 N. J. Law, 87. Upon the same principle rest the Connecticut decisions, that any declaration made by one conspirator, pursuant to the common object and in furtherance of it, is admissible against all of them when the combination is once established. *Cowles* v. *Coe,* 21 Conn. 235; *Knower* v. *Clothing Co.,* 57 Id. 202; *State* v. *Thompson,* 69 Id. 720.

As we hold that there was some evidence tending to show the conspiracy alleged between the defendant and the Carpenters' Union, the testimony in relation to the action of Sanchegrin was admissible, which was in substance that he went out under promises from Howley who was a member of defendant lodge; that he went to the hall used by the defendant as a lodge room, and that he was there paid fifty cents by Howley which the latter received from Page.

The same reason applies to the testimony of Pennington in respect to his conversation with Loveland, also to the testimony of Patch as to his conversation with Young and Hines.

The defendant contends that all the evidence tending to show boycotting was inadmissible for the reason that the plaintiff could not recover damages for injuries thereby received by third persons. But we understand that the purpose of this evidence was to show that the plaintiff was directly injured to the extent to which the boycotting was carried into effect; for instance, if plumbers were not permitted to finish their work upon the boarding-house, the building could not be used for lodging and boarding the plaintiff's workmen; and

if stores were unable to supply the plaintiff's workmen with the necessaries of life, they could not continue in the plaintiff's employment, and thus the plaintiff was injured.

As all the testimony received under the defendant's exception, in our judgment, had some tendency to show the conspiracy claimed and the results of it and efforts made by the conspirators to make the strike effectual by preventing the plaintiff from employing other workmen, it cannot be insisted that there was error in respect to the order in the admission of evidence, for as was said in *Jenne* v. *Joslyn,* 41 Vt. 478, in the end all the evidence became pertinent to the issue. *Spies* v. *People.* The defendant's exceptions are not sustained.

II. On the first day of the trial counsel for the plaintiff gave the counsel for the defendant a written notice requiring the defendant to produce its charter, its constitution and by-laws, its books of records containing the reports of meetings and records of resolutions and votes, the appointment of committees, a list of the members of defendant lodge from May 20, 1902, to the commencement of the suit, and a list of its charter members and the record book. On the following day the plaintiff's counsel stated in open court that he had served such notice upon defendant's counsel, and that the books and papers called for had not been produced. The defendant's counsel then said that he had no authority to produce any such books and papers, that he knew nothing about them, and that the defendant was a secret organization. The court admonished him that notice to him was notice to defendant. A subpoena *duces tecum* was also served upon John F. Tait, the defendant's recording secretary, who had charge of the books and records of the defendant, to bring into court all the records, record-books, paper accounts, charters, resolutions, votes and roll-books of the defendant. Tait appeared in court but brought with him none of the books, records or papers called

for. He stated that he had not read the subpoena and did not understand that he was required to produce the books and papers. He stated that he thought he could get them, and being excused by the court for that purpose, left the court-room but returned later stating that he had not got them, that they were not where he placed them two weeks before, and that the drawer where he kept them had evidently been opened and the books and papers taken out. The court thereupon ordered the defendant and its officers and agents to produce the books that had been called for, and stated the inferences that the law would draw from their non-production. Tait testified that he had had the custody of the books and records, and that the entire records had been taken away. On the day following this order the defendant's counsel was asked if he had the records in court, and he replied that he could only advise that they be produced, that he had so advised, and that he could not personally produce them. Later, Tait was asked if he had made inquiries of John E. Capeless, the defendant's treasurer, and replied that he had not, and had not seen him since the trial began. A few days later Mr. Nourse, the defendant's president, testified that he heard the demand made on the first day of the trial for defendant to produce its books and records, but that he had not seen or learned anything about them since, and that he had not seen the treasurer; that on that day he and Tait had made search in the hall and ante room and could not find the books and records. It was stated in court that a subpoena had been issued for Capeless, but that he could not be found, and the court held that the statement, in the circumstances, was proper. The plaintiff introduced Thomas Mullen as a witness whose testimony tended to show that he saw Charles T. McKean leave the machinists' hall a few nights before with a package about 14 x 10 inches and 2 inches thick, but that

he did not know what was in the package; that it had the appearance of a book; that he had not seen McKean since that night; that he had attended a meeting of defendant lodge about four weeks previous in the defendant's hall and saw there the roll-book and the book of minutes, and described them as about 10 x 14 inches and perhaps an inch thick; that he had attended meetings of the defendant, and that the minutes of the meetings were recorded in the minute book referred to.

Similar efforts were made to obtain from T. C. Young, the recording secretary of Local No. 950 of the Brotherhood of Carpenters and Joiners, the production in court of all the books and records of resolutions, votes, appointment of committees and records of proceedings of that association, but Young produced only the record book of proceedings since January 1, 1903. Mr. Blue, who preceded Young as secretary, and in whose custody Young testified the books and records were left, was ordered to bring such books and records into court, but he testified that Young was the secretary and had the custody of the books and records of the Carpenters' Union. Young was sent in the custody of an officer to the place where he said the books were, but he returned and said he had brought with him all the books and papers he had found in the drawer. He produced the record book from January to July, 1902, and plaintiff's counsel found among the papers a communication from the defendant dated May 31, 1902, announcing the strike and requesting the co-operation and assistance of the Carpenters' Union. This is plaintiff's exhibit 6. Young and Blue were afterwards directed to make further search, but reported that they were unsuccessful in finding the books and records demanded.

A like effort was made to have the books of record of the Central Trades and Labor Council produced. Pennington testified that the Council was composed of three delegates from

each of the several Unions in Rutland and vicinity; that he was then secretary of Protection Lodge, which was one of those unions; that he had not brought the records into court; that he had not the custody of them, and that he did not know where they were and had not seen them since he turned them over to McKean the previous December. The plaintiff's counsel stated in court that subpoenas had been issued for McKean and Capeless but had failed of service. A like effort was made to obtain the records, books and papers of the Journeyman Barbers' Union, 215, with the same result.

III. The court complied with twenty of the defendant's twenty-five requests, and exceptions are insisted upon here only to the refusal to charge in accordance with two of the remaining five, which were:

1. "That the plaintiff cannot recover for any expense incurred by it in procuring other workmen to take the position of the men who left its service on May 20, 1902."

2. "That any threat made by the defendant or anyone associated with it to boycott any boarding-house keeper who entertained or any merchant who supplied with the necessities of life workmen in the employ of the plaintiff, if made directly and exclusively to such boarding-house keeper or merchant, was not an interference with or invasion of the rights of the plaintiff, and for such threats the plaintiff cannot recover."

These requests were not sound in law. As to the first, the correct rule was given to the jury,—that so far as the plaintiff and the men whom it sought to employ to take the places of the strikers were left to their free choice, the plaintiff could not recover though it suffered damage; but the court said that the request ignored one of the vital questions in the case;—"Whether the plaintiff was hindered or impeded in procuring men to take the places of the strikers, and was so hindered and impeded by the defendant lodge or by those

with whom it was in conspiracy, whether individuals or associations, and whether men desiring employment and desirous and willing to work for the plaintiff for the wages which they were offered and on the terms which they were offered, as to hours, etc., whether these men were kept from entering into that employment by coercion or intimidation or undue influence operating either upon the mind or upon the body, that element seems to be omitted. That request in terms the court cannot comply with."

As to the other request the court properly remarked that it "could not say that it is not an invasion of the rights of a free man for others acting in combination to employ threats and intimidation (to use the language of the request), for one man not to supply him with one necessity of life, and another man not to supply him with another necessity of life. The court cannot lay down that doctrine."

IV. The defendant excepted to the compliance with the plaintiff's 10th request to charge, which reads:

"If the jury find the conspiracy charged in the declaration, and that other labor unions in the conspiracy suppressed, concealed or destroyed their records to prevent their being introduced in evidence, the same presumption of guilt may be drawn from such suppression of their records, and the jury may find the facts charged in the declaration established by the presumption arising from the suppression of the records of a co-conspirator." The court evidently used the word "damages" inadvertently, for the word "facts" was used in the request, which was given to the jury verbatim, with the exception of the change of these words and the omission of the words "of guilt" which the court said should be omitted. It is apparent that the court intended to comply literally with the request, and the jury could not have understood that if they made a certain presumption they were to find the damages

claimed in the writ, for the court had instructed them that the burden of proof was upon the plaintiff to make out its case, and after giving the plaintiff's 10th request it was explained that the facts that men struck and went out, and that the plaintiff thereby suffered damage, did not entitle it to recover; that workmen might strike and go out and advise other men who were inclined to take their places, not to do so. In compliance with requests by both the plaintiff and the defendant, the court repeatedly charged that the plaintiff could not recover unless it showed that the injury suffered by it was caused wholly, or in part, by the the unlawful act of the defendant, or of some or all of the associations or persons connected with it; that some unlawful means must have been used—an interference with or invasion of the legal rights of the plaintiff; that intimidation and coercion, either physical or moral, must have been employed by the defendant, or by others in the unlawful combination, to entitle the plaintiff to recover damages. The entire charge, except the expression referred to, was in accordance with the settled rules of law upon the subject of damages in such cases, and the jury could not have been misled. The use of the word "damages" by the court was so inconsistent with the theory of the entire charge upon the subject of damages, that we think it was the duty of counsel to have called the attention of the court to it. It was said by Veazey J., in *Melendy* v. *Bradford,* 56 Vt. 148: "When a judge drops a word or expression, in the course of a long charge, contrary to its whole theory and so plainly error as to force the impression of inadvertence, it is the duty of counsel to call attention to it and not let it pass in reliance upon a general exception in the event of an adverse verdict;" and by Rowell, J., in *Fassett* v. *Roxbury,* 55 Vt. 552: "It is not profitable or salutary to look into a charge with a carping disposition, but it should be taken as a whole;

and although it may contain some expressions that, taken alone, would be error, yet if, as a whole, it breathes the true spirit and doctrine of the law and there is no fair ground to say that the jury has been misled by it, it ought to stand."

The 10th request and instruction were correct. In 3 Greenl. Ev. § 94 the rule is laid down that: "The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one in furtherance of that design, a part of the *res gestae,* and therefore the act of all." See *State* v. *Thibeau,* 30 Vt. 100; 2 Russ. on Cr., Metc. ed., 572.

The fact of a common design, of an individuality of purpose existing between the different associations, provided the conspiracy were established, made the records of the other associations the records of the defendant. As the act of one co-conspirator was the act of all, so the records of one association were the records of all so far as they evidenced the unlawful combination. Indeed, no claim is made in the defendant's brief or argument that the other associations stood differently from it in respect to the non-production of their books and papers.

V. The plaintiff's evidence had tended to show that the defendant, having control of the books and papers called for by the plaintiff and ordered by the court to be produced, had refused to produce them in defiance of the order; that the reasons given for their non-production were frivolous and derisive; that the defendant and its officers stood before the court in the attitude of men who had spoliated or suppressed

evidence. The question is whether the court applied the correct rule of law in the instructions to the jury.

In charging upon this subject the court stated without objection that it had been shown that the defendant "had books, books of minutes," and that was treated as a fact in the case. The court, however, did not assume as a fact that the defendant might have produced the books, records etc., called for, but submitted that question to the jury. This language was used in the charge: "But you can easily see that if books are destroyed; if books are hidden; if books are carried away, the power of the court is limited in that respect; * * * But the arm of the law is long enough and strong enough to reach cases of that sort, and when the jury feel in a civil case, when they are satisfied by a fair balance of proof, fair balance of probabilities, that a party has suppressed books, has hidden books, has kept books away that have been called for and which it has had notice to produce, then the law says the jury may presume from the absence of those books and papers against the party called upon to produce them, and not producing them, and in favor of the other party." Further on the court said: "If you find that the defendant, after being notified to produce books and papers, has failed to do so, you have a right to presume that it is because those books and papers would make against its claim and in favor of the claim of the plaintiff" * * *. "You can give to that presumption such weight as you think it ought to have. You may find or presume that the claim of the plaintiff is true and that the claim of the defendant is false, is untrue, if you find that the defendant has suppressed evidence which has been duly called for. In the view that the court takes of the matter, the weight of it rests with you." To these instructions the defendant excepted. (We think that, in the connection in which

it was used, the word "failed" was equivalent to *refused,* having the power to obey the order.)

The defendant contends that this was a literal application of the doctrine of *omnia præsumuntur in odium spoliatoris;* that the remarks of the court above quoted amounted to an instruction that, if the jury found that the books had been destroyed or suppressed, they might presume, without other proof of the fact, that they contained evidence of the conspiracy. The jury could not have so understood it, for immediately after the above instructions were given the court explained what the claims of the parties were,—the plaintiff's, that there had been coercion and intimidation resulting in damages,—the defendant's, that it had only advised but made no attempt to interfere with the free choice and judgment of workmen. The court then remarked that the jury knew what the claims and evidence were on both sides and that he would not undertake to review the evidence in full. After thus stating the question to the jury, he told them that they must "consider what had been produced in evidence; that they knew the history of the case." He called attention to the fact that the defendant had not produced the books of the association after repeated notice to produce them—after it was shown that it had them; also to the "stickers" and circulars, and submitted to the jury to find whether they were signed by authority of the associations, whether the different associations were associated together, and, if these facts were found, whether these "stickers" and circulars fairly represented the circumstances and situation at Rutland. In calling attention to different parts of the evidence the court repeatedly said to the jury: "It is for you to say." In complying with several of the defendant's requests, he charged, as before stated, that to entitle the plaintiff to recover, he must prove that he was

injured by some unlawful act of the defendant or its associates.

Taken together this fairly shows that the court charged the jury that if they found the defendant had suppressed the books and papers, they might find or presume the plaintiff's claim upon the evidence was true, and that the defendant's claim was false. It cannot be fairly said that the jury must have understood it to mean otherwise. If this is the fair meaning of the charge, and we think it is, the jury are presumed to have so understood it, and there was no error.

The rule of law governing this question was substantially complied with, which is, that the presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden. It cannot supersede the necessity of other evidence. The presumption is regarded as merely matter of inference in weighing the effect of evidence in its nature applicable to the question in dispute. *Arbuckle* v. *Templeton,* 65 Vt. 205, 25 Atl. 1095.

VI. After verdict and before judgment the defendant filed a motion that the verdict be set aside and a new trial granted by reason of the misconduct of a juror during the trial. Testimony was taken on both sides and the motion was fully heard by the trial court upon the testimony submitted and the motion was denied. The court filed no statement of facts, and, therefore, under the decision in *Mullin* v. *Rowell,* 56 Vt. 301, the question is not before this court.

Judgment affirmed.

Start, J. dissents, holding that the exceptions to the charge should be sustained.

WALTER MAY, ALIAS BENJAMIN F. STEVENS *v.* STATE OF VERMONT.

January Term, 1905.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed March 3, 1905.

Criminal Law—Petition for New Trial—Newly Discovered Evidence — Cumulative — Affidavits — Sufficiency—Allegation of Due Diligence.

On a petition for a new trial, under V. S. 1662, founded on newly discovered evidence, the statement, by the petitioner and his counsel in their affidavits, that they used all due diligence to seasonably obtain such evidence, is insufficient to show due diligence; such averment being the mere statement of a legal conclusion.

When the material question in the trial of a criminal case was as to the identity of the respondent, and the newly discovered evidence relied upon in a petition for a new trial goes only to the question of such identity, it is cumulative evidence merely, within the rule forbidding the granting of such petitions.

A petition for a new trial founded on newly discovered evidence will not, ordinarily, be granted by the Supreme Court, when it appears that a motion for a new trial, based on the same affidavits which are relied upon in said petition, was made in the county court and there heard and overruled, and no abuse of that court's discretion is shown.

Such motion is addressed to the discretion of the trial court, and its ruling thereon, without abuse of that discretion, is not a matter of exception. To grant said petition in these circumstances would be, in effect, to give the petitioner the benefit of an exception to such ruling.

PETITION FOR A NEW TRIAL, brought under V. S. 1662, to the Supreme Court for Chittenden County at its January Term, 1905, and then heard on affidavits taken and filed.

Martin S. Vilas for the petitioner.

The evidence given in the affidavits is not merely cumulative. *Waller* v. *Graves,* 20 Conn. 311; *Parker* v. *Hardy,* 24 Pick. 246; *Alger* v. *Merritt,* 16 Iowa 21; *Grogan* v. *R. Co.,* 39 W. Va. 415; *Coldworthy* v. *Linden,* 75 Wis. 34; *German* v. *Bank,* 38 Ohio, 368; *Bradish* v. *State,* 35 Vt. 456.

The rule against cumulative evidence is not intended to be carried out strictly, otherwise new trials would be impossible. *Leavy* v. *Roberts,* 8 Wis. 310; *Boggess* v. *Read,* 83 Iowa 548; *Myers* v. *Brownell,* 2 Aik. 406.

Even if the evidence contained in the affidavits is cumulative, this will not necessarily invalidate its force. *Vollkommer* v. *Nassau Electric R. Co.,* 23 N. Y. App. Div. 88; The *Wilcox Silver Plate Co.* v. *Barclay,* 48 Hun. 54; *Barrett* v. *The Third Ave. R. R. Co.,* 45 N. Y. 628.

Regardless of whether the evidence is cumulative, if it be such as to raise a strong probability of a different result on a new trial, such new trial should be granted. *Barkers* v. *French,* 18 Vt. 460; *Burr* v. *Palmer,* 23 Vt. 246; *Myers* v. *Brownell,* 2 Aik. 406; *Halstead* v. *Horton,* 38 W. Va. 727; *Smith* v. *Graves,* 74 Wis. 171; *Hart* v. *Brainer,* 68 Conn. 50; *Keet* v. *Mason,* 167 Mass. 154.

If, on the evidence presented, a clear case against the respondent is rendered doubtful, a new trial should be granted. *Anderson* v. *State,* 43 Conn. 514; *Waller* v. *Graves,* 20 Conn. 305.

The petition is addressed to the sound discretion of this Court. *Myers* v. *Brownell,* 2 Aik. 406; *Barrett* v. *R. Co.,* 45 N. Y. 628; *Clegg* v. *Newspaper Union,* 57 Hun. 232.

The burden of showing that the evidence is merely cumulative is on the State. *Rowland* v. *Reeves,* 25 Mo. App. 458; *Robler* v. *Cole,* 49 Cal. 25.

Alfred L. Sherman, State's Attorney, for the State.

All the alleged newly discovered evidence is additional evidence of the same kind to the same point as that introduced by respondent at the trial, and is, therefore, cumulative evidence. *Parker* v. *Hardy,* 24 Pick. 246; *Bradish* v. *State,* 35 Vt. 452; *Thayer* v. *C. V. Railroad Co.,* 60 Vt. 214; *Jenkins* v. *Eldredge,* 3 Story 299.

A new trial will not be granted unless it is reasonably certain that an injustice has been done. *Westmore* v. *Sheffeld,* 56 Vt. 239; *Town of Middletown* v. *Adams,* 13 Vt. 285; *Beckwith* v. *Middlesex,* 20 Vt. 593; *Thayer* v. *C. V. R. Co.,* 60 Vt. 214; *Doherty* v. *State of Vermont,* 73 Vt. 380; *Burr* v. *Palmer,* 23 Vt. 244; *State of Vermont* v. *Doherty,* 72 Vt. 381; *Badger* v. *State,* 69 Vt. 217; *Jones* v. *Sennott,* 57 Vt. 355.

POWERS, J. The petitioner was convicted under the name of Benjamin F. Stevens of the crime of forgery. He claimed at the trial, as he now does, that he is not Stevens, who, it is admitted, committed the crime, but is Walter May. So the question of the petitioner's identity was one of the principal controversies of the trial. Witnesses were produced by the State who testified to different points of resemblance between the petitioner and the man Stevens who was known to have committed the forgery; others were produced by the petitioner who testified to points of dissimilarity between them; and these witnesses gave opinions on the question of identity accordingly. Witnesses for the State gave a good description of the physical appearance of Benjamin Stevens,—his height, weight, complexion, etc. At the time of the trial the petitioner had a heavy full beard and wore glasses. Stevens was described as having a brown or sandy moustache and as not wearing glasses. Immediately after the verdict, the petitioner shaved off his beard, removed his glasses, and then called in the witnesses who had testified at the trial, or the most of them,

to give their opinions as to his identity based upon his personal appearance thus altered. The evidence in support of this petition tends to show that these changes, though making his physical appearance more in harmony with the description given of Stevens, made it more certain that he was not in fact Stevens. The evidence taken by the State tends to show that these changes made it more certain that Stevens and May were one and the same person.

There are several reasons why we cannot grant the prayer of this petition. In the first place, it does not satisfactorily appear that due diligence on the part of the petitioner would not have put him in possession of this evidence in time for use at the trial. To be sure the petitioner and his counsel say in their affidavits that they used all due diligence in this regard; but this is the mere statement of a legal conclusion, and no facts are set forth, and none appear from the case as presented, from which we can form an independent opinion on that question.

Again, the new evidence is cumulative, merely. It is additional evidence of the same kind to the same point. It varies in certain features from any given at the trial, but it all goes to the question of identity, which is the *point* referred to in the rule.

And finally, it appears that a motion for a new trial, based upon the same affidavits which are relied upon here, was made in the court below. After hearing, this motion was overruled, a fact which has considerable weight with this Court in determining questions of this kind. *Briggs* v. *Gleason*, 27 Vt. 117. This motion was addressed to the discretion of that court and is not matter of exception in the absence of abuse. To allow this petition under these circumstances, would be, in effect, to give the petitioner the benefit of an exception to which he is not entitled.

None of the foregoing reasons are absolutely determinative of the question here presented, but in order to prevail against them a petition would have to be supported by evidence more decisive and controlling in its character than that before us.

Petition dismissed.

ARTHUR G. OSGOOD *v.* CENTRAL VERMONT RAILWAY CO.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed March 9, 1905.

Railroads—Contracts to Indemnify Against Negligence—Public Policy—Penal Statutes—Construction—Illegal Contracts—V. S. 3924.

A penal statute is to be construed with reference to its spirit and reason; and courts have power to declare that a case that falls within its letter is not within the statute, because not within its spirit and reason.

V. S. 3924, penalizing the negligence of an agent of a railroad company, whereby an injury is done to a person or corporation, does not extend to injuries in which the public has no interest, but which are wholly of private concern.

When there is a promise to do two things, one legal and the other illegal, the promise to do the legal act will be enforced and the promise to do the illegal act disregarded, irrespective of whether there are two distinct promises, or whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable.

A contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society.

The defendant railroad company leased to the plaintiff a piece of its roadway for a coal and lumber shed at an annual rental, in consideration whereof plaintiff agreed to pay the rent and to indemnify defendant from all liability for loss or damage to himself, his property or servants, occasioned by the negligence of defendant's servants. *Held*, in an action for negligently running an engine against a shed built on the premises pursuant to the lease, that the injury is purely of private concern, so that an agreement for indemnity in respect thereof is not in contravention of V. S. 3924, nor against public policy; and that said agreement, being severable from the rest of the contract of indemnity, is enforceable.

CASE FOR NEGLIGENCE. Plea, the general issue. Heard on an agreed statement of facts at the June Term, 1904, Orange County, *Rowell,* J., presiding. Judgment, *pro forma,* for the plaintiff for $300 and costs. The defendant excepted. The agreed statement set forth the lease mentioned in the opinion; alleged that the car and engine were negligently run against the plaintiff's shed by the servants of the defendant, while within the scope of their employment, that, if defendant was liable on the agreed statement, judgment should be rendered against it for $300 and costs; and that if defendant was not liable, it should have judgment to recover its costs.

C. W. Witters for the defendant.

The lease is not a contract against public policy. *Bates* v. *R. Co.,* 147 Mass. 255; *Baltimore etc. R. Co.* v. *Voight,* 176 U. S. 469; *Phoenix Ins. Co.* v. *Erie etc. Co.,* 117 U. S. 312; *Copeland* v. *Housatonic Ry. Co.,* 61 Conn. 531; *Barrett* v. *Carden,* 65 Vt. 431.

M. M. Wilson and *E. M. Harvey* for the plaintiff.

The lease is void as contravening V. S. 3924, and 3926; and as against public policy. *Coppell* v. *Hull,* 7 Wall. 558; *Tarbell* v. *R. Co.,* 73 Vt. 347; *Elkins* v. *Parkhurst,* 17 Vt. 105; *Johnson* v. *Railroad,* 86 Va. 975; *R. Co.* v. *Spangler,* 44 Ohio St. 471; *Gardner* v. *Tatum,* 81 Cal. 370; *R. R. Co.* v. *Ryan,* 15 Kan. 357; *Griswold* v. *Railroad,* 90 Iowa 265; 24 L. R. A. 647.

Rowell, C. J. The case is this. The defendant leased to the plaintiff for five years a piece of its roadway for a site for a coal and lumber shed, at an annual rent of fifteen dollars, payable in advance; in consideration of which the plaintiff agreed to pay said rent, and to indemnify and save harmless the defendant from all liability for loss, damage, or injury to himself, his property, servants, or agents while upon or about said premises, occasioned by fire or otherwise, resulting from the negligence of the defendant, its servants, agents, or in any other manner. The action is for negligently running an engine and a car off a spur track and against the plaintiff's shed, built upon said premises pursuant to said lease, thereby wrecking the same, and breaking and destroying divers wagons and other carriages stored therein.

The plaintiff claims that said contract is in contravention of sections 3924 and 3926 of the Vt. Statutes, and also against public policy, and therefore illegal and void.

Section 3924 provides that when an engineer, fireman, or other agent of a railroad, is guilty of negligence or carelessness whereby an injury is done to a person or corporation, he shall be imprisoned not more than a year, or fined not more than a thousand dollars; but that the section shall not exempt a person nor a corporation from an action for damages.

As the inhibition to contract implied by this section, whatever it is, cannot extend beyond its penalization, it is important to determine whether it penalizes the injury complained of. Conceding for present purposes that it penalizes all injuries in which the public has an interest, does it penalize injuries in which the public has no interest, but which are wholly of private concern? This depends upon the construction to be given to it, for its language is broad enough to include all injuries, regardless of the interests they touch.

Penal statutes are to be strictly construed, though not so strictly as to defeat their purpose. They are, like other statutes, when not too plain and specific for construction, to be construed with reference to their spirit and reason; and courts have power to declare that a case that falls within their letter is not within the statute because not within its spirit and reason and the intention of the Legislature. The Supreme Court of Pennsylvania says, quoting somebody, that "no man incurs a penalty unless his act is clearly within both the spirit and the letter of the statute imposing the penalty." *Commonwealth* v. *Wells,* 110 Pa. St. 463, 468. The Supreme Court of Maryland said much the same thing in *Clarfoss* v. *State,* 42 Md. 403. There are many forcible illustrations of the application of this rule. Puffendorf mentions a case in the Bolognian law in which it was adjudged that an enactment that "whoever drew blood in the streets should be punished with the utmost severity," did not apply to a surgeon who bled a man that fell down in the street in a fit. Blackstone says that the most universal and effectual way of discovering the true meaning of a law is, when the words are dubious, by considering the reason and spirit of it, or the cause that moved its enactment; and instances a case put by Cicero, of a law that those who, in a storm, forsook the ship, should forfeit all property therein, and that the ship and the lading should

belong entirely to those who stayed in it. In a tempest, all forsook the ship except one passenger, who was too sick to leave it. By chance the ship came into port, and the sick man kept possession and claimed the benefit of the law. But all the learned agreed that he was not within the reason of the law, which was to give encouragement to such as should venture their lives to save the ship, and that this was a merit to which the sick man could not pretend, for he stayed in the ship neither to save it nor to contribute to its safety. 1 Bl. Com. 61. The statute of 1st Edward II enacted that a prisoner who broke prison should be guilty of felony. But it was held not to extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Plowden says in his comments on *Stradling* v. *Morgan,* at p. 205a, as the result of many cases to which he refers, that "the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend to but some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only,—which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the statute; sometimes by comparing one part of the act with another; and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." This agrees with Coke, who somewhere says that "he who knoweth not the reason of the law, knoweth not the law itself." And again

he says, that "acts of Parliament are to be so construed as no man that is innocent or free from wrong be by a literal construction punished or endamaged." In *Murray* v. *Baker,* 3 Wheat. 541, the words, "beyond seas," copied from an English statute, were construed to mean, "without the limits of the state."

In *The Church of the Holy Trinity* v. *United States,* 143 U. S. 457, it was held that the penal act of February 26, 1885, "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor" in this country, does not apply to a contract between an alien resident out of the United States and a religious society incorporated under the laws of a state, whereby the alien engaged to remove to this country and enter into the service of the society as its rector and pastor, and removed and entered into the service accordingly. The Court said that the society was within the letter of the statute, for not only were the general words, "labor and service," both used, but, as if to guard against any narrow interpretation, and to emphasize a breadth of meaning, to those words is added, "of any kind;" and further, that as the statute made specific exceptions, and among them, professional actors, artists, lecturers, singers, and domestic servants, it thereby strengthened the idea that every other kind of labor and service was intended to be reached; and that while there was great force in this reasoning, the Court could not think that Congress intended to denounce with penalties a transaction like the one in that case. The Court went on to say that it is a familiar rule that a thing may be within the letter of a statute and yet not be within the statute because not within its spirit nor the intention of its makers; that this is not the substitution of the will of the Court for that of the Legislature, for frequently words of general meaning are used in a statute, broad enough to in-

clude the act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results that would follow from such a broad meaning, makes it unreasonable to believe that the Legislature intended to include the particular case.

It is said in *Ryegate* v. *Wardsboro,* 30 Vt. at p. 749, that the letter of the law is found by experience not to be in all cases a correct guide to the true sense of the lawgiver, wherefore rules have been adopted for the construction of statutes that look to the whole and every part of the act, to the subject-matter, the effects and consequences, the reason and spirit of the law, and thus ascertain the true meaning of the Legislature, though the meaning ascertained conflicts with the literal sense of the words. Chief Justice Marshall says in *United States* v. *Fisher, 2* Cranch, 358, 386, that when the mind labors to discover the design of the Legislature, it seizes everything from which it can derive aid.

Applying this doctrine to the case in hand, we think that section 3924 does not extend to injuries in which the public has no interest, but which are wholly of private concern. Said section is a part of the railroad law that applies exclusively to "operating railroads," and contains many specific provisions on that subject, most of which were manifestly enacted for the safety, protection, and general benefit of the public, and apparently without reference to merely private matters in which the public has no interest, leaving those to be dealt with by the common law, the same as in other cases. Suppose, for example, that section-men should negligently and carelessly run a handcar over and injure a trifling thing of no public interest; or if section-men are not within the statute, suppose an engineer should negligently and carelessly run his engine over and injure such a thing, incapable of harming the train; would they incur the penalty? If so, it would be because the

act came within the spirit and reason of the law as well as within its letter, and because such a construction would be necessary in order to accomplish the object and purpose of the law, and to effectuate the intention of the Legislature. But this seems too much to say. Hence the language of the statute, which comprehends all injuries, must, as Plowden says, be expounded to extend to but some injuries. But where shall the line be drawn? It cannot be drawn arbitrarily, for that is not exposition. It must, then, be drawn with reference to some difference that bears a just relation to the object and purpose of the statute; and this difference is found between injuries in which the public has an interest, and injuries in which it has no interest, but which are purely of private concern; and that the injury in question is purely of private concern cannot be doubted, for it is nothing to the public whether the plaintiff or the defendant bears this loss, concerning which the defendant was not contracting in its public capacity of a common carrier, but only in its private capacity.

It follows, therefore, that if that part of the contract covering the injury here involved stood alone, the contract would not be in contravention of section 3924. But as it does not stand alone, but is part of a promise to indemnify against injuries in which, it is claimed, the public has an interest, it is contended that the whole promise must fall, as it is not divisible.

The general rule is, where you cannot sever the illegal from the legal part of a contract, that the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, that you may reject the bad and retain the good. It was unanimously agreed in 14 H. 8. 25, 26, that if some of the covenants of an indenture or of the conditions indorsed upon a bond, are

against law and some good and lawful, that the covenants or conditions that are against law are void *ab inito,* and the others stand good. This was adopted in *Pigot's Case,* 11 Coke, 26; and from it has sprung the generally accepted doctrine that where there is a promise to do two things, one legal and the other illegal, the promise to do the legal act will be enforced, and the promise to do the illegal act will be disregarded. *United States* v. *Bradley,* 10 Pet. 343, 360. And it makes no difference whether there are two distinct promises, or whether there is one promise that is divisible, nor whether the consideration for the two promises is entire or apportionable. *Greenwood* v. *Bishop of London,* 5 Taunt. 727, 381-82; *Newman* v. *Newman,* 4 M. & S. 66; Harriman on Cont. 134.

One of the most common instances of the application of this rule is in cases of agreements in restraint of trade, which are held to be divisible both as to time and place. *Baines* v. *Geary,* L. R. 35 Ch. D. 154, is a case of the former kind. There, in an agreement for employment as a milk carrier, the servant undertook not to serve nor interfere with any customers served by, or belonging at any time to, the master, his successors or assigns. Held severable, and capable of enforcement in respect of persons who were customers during the employment. There are many cases of the latter kind. In *Price* v. *Green,* 16 M. & W. 346, the covenant was, never to carry on a certain business in the cities of London nor Westminster, nor within six hundred miles of them. Held, that the covenant was divisible, and good as to those cities, but bad as to the six hundred miles. A covenant not to engage in the manufacture of ocher "in the county of Lehigh or elsewhere," is divisible, and good as to the county. Smith's Appeal, 113 Pa. St. 579. A contract not to engage in a particular trade or business for a specified time "in the city of St. Louis nor at any other place," is divisible. *Peltz* v. *Eichele,* 62 Mo. 171.

So a covenant not to enter into a certain business in a certain county, nor, for a time, into the same business in the United States, is good as to the first, though bad as to the last. *Dean* v. *Emerson,* 102 Mass. 480.

It is to be noticed that the consideration for the plaintiff's promise in the case at bar is wholly legal, and has been practically executed by allowing the erection and use of the structure.

Under the rule above stated, that part of the plaintiff's promise of indemnity here involved is severable from the rest of the promise and enforceable, not being in contravention of the statute, unless it is against public policy, which the plaintiff claims, but which we do not think. It is said in *Griswold* v. *Illinois Central R. R. Co.* 90 Iowa, 265, that "public policy is variable; that the very reverse of that which is the policy of the public at one time, may become public policy at another time, and hence no fixed rule can be given by which to determine what is public policy; that the authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society." It is said by Mr. Justice Gray in *Hartford Ins. Co.* v. *Chicago etc. Railway Co.,* 175 U. S., at p. 106, that this is in exact accord with the opinion in *Pope Manufacturing Co.* v. *Gormully,* 144 U. S., at p. 223. Sir George Jessel, Master of the Rolls, says in *Printing Co.* v. *Sampson,* L. R. 19 Eq., at p. 465, that "it must not be forgotten that you are not to extend arbitrarily those rules that say that a given contract is void as being against public policy, because if there is one thing more than another that public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and be enforced by courts of jus-

tice; wherefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

This language is quoted and approved in *Baltimore & Ohio etc. R. R. Co.* v. *Voigt,* 176 U. S., at p. 505, where it is further said that "the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is, to maintain and enforce contracts, rather than to enable parties thereto to escape from their obligation on the pretext of public policy."

A railroad corporation holds its station grounds, railroad tracks, and right of way, for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others in the manner that it may consider best fitted to promote, or not to interfere with, the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for receiving and delivering freight upon its road, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railway Co.* v. *Richardson,* 91 U. S. 454. And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. *Covington Stockyards* v. *Keith,* 139 U. S. 128. But it is not obliged, and cannot be compelled even by statute, against its will, to permit private persons to erect and maintain structures for their own benefit upon the land of the company. *Missouri Pacific Railway Co.* v. *Nebraska,* 164 U. S. 403.

In the case at bar the plaintiff had no right to build his shed upon the land of the defendant without its permission, and it was under no obligation to the public nor to the plaintiff to permit him to do it. In granting and receiving the permission to do it, and in erecting it, both parties knew that its proximity to the spur track, the building of which was con-

templated, would increase the risk of damage by cars running off that track accidentally or by negligence. The principal consideration expressed in the lease for the license granted, is the stipulation for exempting the defendant from liability to the plaintiff for damage thus occasioned, and the public had no interest in that matter. In *Griswold* v. *Illinois Central Railway Co.* 90 Iowa, 265, it was held that a stipulation in a contract in which a railroad company permitted a building to be erected on its right of way wherein to do business with the public, that the company should not be liable for damage by fire negligently communicated by it to the building, did not contravene public policy, because the public had no interest as to who should carry the hazard incident to the building's being located as it was.

Stephens v. *Southern Pacific R. R. Co.* 109 Cal. 86, is to the same effect. There the defendant leased to the plaintiff land adjoining its depot grounds on which the plaintiff had built a warehouse. He covenanted in the lease that the company should not be liable to him for damage caused by fire from its engines or otherwise. Held, that he could not recover for the destruction of the warehouse by fire spreading from the company's adjoining land, negligently kindled thereon by its servants for the purpose of burning dry grass and rubbish, and that the covenant did not contravene public policy, nor, as the Court said, did it increase the risk and danger to the public by tending to promote negligence. This may with equal truth be said of the case at bar. It is not like the Tarbell case, 73 Vt. 347, 51 Atl. 6, for there the negligence stipulated against touched the interest of the public, as the public has an interest in the personal safety of railroad operatives while at work.

In the very recent case of *Mann* v. *Pere Marquette R. R. Co.*, decided by the Supreme Court of Michigan, and found in 97 N. W. Reports, 721, the plaintiffs were lumbermen, and

owned a large mill. Desiring to have side tracks laid thereto for shipping in and out products, they applied to the defendant to put them it, and thereupon a contract was entered into, whereby the company agreed to build the tracks, and the plaintiffs, recognizing that the use of them involved risk of loss by fire from engines, assumed as a further inducement and consideration for their construction, all such risk of fire, and released the company from all liability, statutory or otherwise, for loss or injury to them by fire, whether due to the negligence of the company or its employees or otherwise. The Court said that the case did not fall within those where contracts to exempt from liability are held void on the ground of public policy; that it is a fundamental rule that what one may refuse to do entirely, he may agree to do upon such terms as he pleases; that the defendant was not acting as a public carrier, and was not bound to put in the tracks; that there was no occasion to contract against properly equipped and properly managed engines, for fire caused by such would not impose liability; and that the only purpose of such a contract was, to avoid the consequences of the defendant's own negligence, which it had a perfect right to contract against, both in reason and on authority.

These cases are not so strong as the one at bar, for the fires there stipulated against might have spread and endangered the public, while the cause of the injury here involved necessarily spent itself with the injury.

As the promise is divisible, we have no occasion to consider whether the rest of it is against public policy or in contravention of either of said sections, the last of which provides that those owning or operating a railroad shall be responsible in damages for injuries by fire communicated by engines, unless due caution and diligence are used, and suitable expedients employed, to prevent such damage.

We hold, therefore, that that portion of the contract applicable to the injury in question, is not against public policy nor in contravention of said sections, but is good and enforceable against the plaintiff.

Judgment reversed, and judgment for the defendant to recover its costs.

SPRIGG'S ADMR. *v.* RUTLAND R. R. CO.

October Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, and HASELTON, JJ.

Opinion filed March 9, 1905.

Carriers—Contracts—Carrier's Stipulation Limiting its Common Law Liability—Stipulation by Carrier for Indemnity Against its own Negligence—Passengers for Hire—Caretakers of Cattle—"Union Live Stock Contract"—Construction.

A common carrier cannot lawfully stipulate for exemption from liability unless such exemption is just and reasonable in the eye of the law.

It is against public policy for a common carrier to stipulate for indemnity against its own negligence in respect of its carriage of a passenger for hire.

A caretaker accompanying a shipment of cattle under a contract with the railroad company, based upon the same consideration as the contract of shipment, which showed that it was made in contemplation of the caretaker's contract, is a passenger for hire, towards whom the railroad company occupies the position of a common carrier.

A contract for the shipment of cattle in the company of a caretaker, exempting the carrier from liability in excess of an agreed valuation for damage to the cattle, whether caused by negligence or otherwise, and exempting it from any liability for injury to the caretaker, is divisible in its provisions as to the cattle and the caretaker, and, therefore, if one of these provisions is legal, it may be sustained, although the other is void as illegal.

A contract for the shipment of cattle, and a subsequent contract for the carriage of a caretaker to accompany the cattle, each of which is expressed to be in consideration of the carriage of the caretaker without further charge than the sum paid for the transportation of the cattle, and each of which shows that it was made in contemplation of the other, constitute but one contract supported by the same consideration.

CASE FOR NEGLIGENCE. Plea, the general issue. Heard on an agreed statement of facts at the June Term, 1904, Addison County, *Munson,* J., presiding. Judgment for the plaintiff. The defendant excepted. The opinion fully states the material facts.

Frank L. Fish and *H. Henry Powers* for the defendant.

It is now the established doctrine that a common carrier may by contract limit his common law liability. *McCarley* v. *The Furness Railway Co.,* 8 Law Rep. Q. B. Div. 57; *Bissell* v. *N. Y. C. R. Co.,* 25 N. Y. 442; *Poucher* v. *N. Y. C. R. R. Co.,* 49 N. Y. 263; *Call* v. *Texas & P. R. R.,* 194 U. S. 427; *Baltimore & O. R. R. Co.* v. *Voigt,* 176 U. S. 498; *N. P. R. R. Co.* v. *Adams,* 192 U. S. 440; *Duncan* v. *Maine Central R.,* 113 Fed. Rep. 503; *Quimby* v. *B. & M. R. R.* 150 Mass. 365; *Griswold* v. *N. Y. C. R. R. Co.,* 53 Conn. 371; *Gulf, C. etc., R. R.* v. *McGown,* 65 Tex. 640; *Rogers* v. *Kennebec Co.,* 86 Me. 261; *Kinney* v. *Central R. R.,* 34 N. J. Law 513; *Payne* v. *T. H. & I. R. R.,* 157 Ind. 616.

Cushman & Russell for the plaintiff.

The plaintiff's intestate was a passenger for hire. *Railroad Co.* v. *Lockwood,* 17 Wall. 357; *Carroll* v. *Missouri Pac. R. R.,* 88 Mo. 239; *Louisville, N. A. & Chi. R. R.* v. *Faylor,* 126 Ind. 126; *Doyle* v. *Fitchburg R. R.,* 166 Mass. 492; *Thorp* v. *Concord Railroad,* 61 Vt. 378; *Pennsylvania R. R.* v. *Henderson,* 51 Pa. St. 315; *Feldschneider* v. *Chi. M. & St. P. Ry.,* 99 N. W. 1034; *Ill. Cen. R. Co.* v. *Beebe,* 69 Ill. App. 363.

The stipulation on the part of the defendant for indemnity against its own negligence is against public policy and void. *Gillis* v. *Telegraph Co.,* 61 Vt. 461; *Railroad Co.* v. *Stevens,* 95 U. S. 655; *The Kensington,* 183 U. S. 263; *Davis & Gay* v. *Cen. Vt. R. Co.,* 66 Vt. 290; *Tarbell* v. *Rutland R. R.,* 73 Vt. 347; *Mann* v. *Birchard,* 40 Vt. 326; *Baltimore & O. R. Co.* v. *McLaughlin,* 73 Fed. 519; *Ill. Cen. R. Co.* v. *Anderson,* 56 N. E. 331; *Louisville & N. R. Co.* v. *Bell,* 38 S. W. 3; Elliott on *Railroads,* § 1605; 57 Cen. Law Journal, 83; Hutchinson on Carriers, § 555 B.

ROWELL, C. J. This is case for negligence as a common carrier. Parker procured a cattle car of the defendant, and shipped therein a load of cattle to Boston over defendant's road and connecting lines. At the time of the shipment, he and the defendant executed a duplicate "union live stock contract," which provided that the shipper or the consignee should pay freight at the rate of 21 cts. per 100 lbs., which was expressed to be the lower published tariff rate, based on the condition that the carrier assumed liability on the cattle only to the extent of a certain agreed valuation, on which was based the rate charged for the transportation, and beyond which the carrier should not be liable in any event for negligence nor otherwise. It also provided that the shipper should, at his own risk and expense, load the cattle, and feed and care for them in

transit; and should, in consideration of the premises, and of the carriage of a person in charge of the cattle on a freight train without charge other than the sum paid for transportation, indemnify and save harmless the carrier from liability of every kind by reason of personal injury sustained by such person, whether the same was caused by the negligence of the carrier or its employees or otherwise. And therein the shipper acknowledged that he had the option of shipping the cattle at a higher rate of freight according to the official tariffs, classifications, and rules of the carrier, and thereby receiving the security of the liability of the carrier and connecting lines as common carriers, but that he had voluntarily decided to ship under said contract at the reduced rate mentioned therein. Said higher rate was twenty per cent more than the rate charged under said contract, and the freight on the cattle at the rate charged was $42.00.

Sprigg, the intestate, was the caretaker of the cattle, and signed a contract printed on the same sheet of paper as the other contract, and immediately following it, entitled, "Contract with man or men in charge of live stock," whereby he assumed, in consideration of his carriage on the stock train mentioned in the other contract without charge other than the sum paid or to be paid for transporting the cattle,—all risk of accident or damage to his person; and released and discharged the carrier from all liability on account of personal injury sustained by him, whether caused by the negligence of the carriers, its employees, or otherwise.

By the rules and regulations of the defendant, the intestate could not have ridden on said stock train without signing, or otherwise assenting to, said last-mentioned contract; and there was no other consideration to support said contract except the one mentioned therein. The rate of freight paid

would have been the same in amount whether the cattle were accompanied by a caretaker or not.

While in the caboose of said stock train, which was the proper car for him to be in and ride in, the intestate, without fault on his part, received the injuries sued for, by reason of a rear-end collision caused by the actionable negligence of the defendant's servants.

The defendant contends that the case is governed by *Kimball* v. *The Rutland & Burlington R. R. Co.* 26 Vt. 247. There as here, the shipper had the option to pay more and hold the company to safe delivery; but chose to pay less, and take what he stipulated for, which was, the court said, the privilege of becoming his own carrier, thereby making the company a private carrier, and varying its obligation as a common carrier to such an extent that no recovery could be had under the declaration, which charged the company only as a common carrier.

But that case is no authority for the proposition here contended for, that a railroad company can justly stipulate for immunity against its own negligence as a carrier, for that question was not involved, as there was no such stipulation in the case, but directly the contrary was stipulated, namely, that the company would use all reasonable care and diligence in respect of the cattle shipped, injury to which was alone sued for. That stipulation was, that "at the rate charged as per tariff, no risk will be assumed by the corporation for any injury to live stock which they may do to each other or themselves, or any damage caused by breaking from the cars or otherwise; nor will they hold themselves liable for damage caused by accidental delays or weather; but the corporation will use all reasonable care and diligence." It is true that a ticket, called a free pass, was stipulated for to the caretaker, without assumption of risk by the corporation for his personal

safety; but, as we have seen, no question arose concerning that matter, for no personal injury to him was sued for.

The plaintiff contends that the intestate was a passenger for hire, and that the stipulation for immunity from negligent injury to him is against public policy and void.

The defendant contends that the nature of the contract determines the case; that if it be a tripartite agreement based on valuable consideration, the rights of all three of the parties are found therein; that it seems absurd to say that the contract is valid as to the transportation of the stock, but invalid as to the transportation of the man who cared for the stock; that is, that as to the stock, the rights of the parties are fixed by the contract, but as to the man, his rights are fixed by the common law; that it is more logical to say that the contract fixes the rights of all the parties who executed it; that if it be one contract and not two; if the intestate's contract binds the defendant through the shipper's contract; if the former is merely a specification as far as the defendant is concerned of its obligations assumed by the latter; if the former is based upon the same consideration as the latter, and merely carries its provisions into effect as far as the defendant is concerned,—then it is clear that the defendant should have the protection given it by the terms of both; that the intestate came into the shipper's contract for the purpose of carrying it into effect, in which he had no interest other than as representing the shipper and as his servant, and that he paid no consideration for his transportation, and if anybody did, it was the shipper or the consignee, and they paid nothing except the freight on the stock; that it is illogical to say that they paid 21 cents per 100 lbs. of the weight of the cattle, and that this included the caretaker; that it was not the payment of a gross sum of $42.00, as claimed by the plaintiff, but the payment of 21 cts. per hundred, which happened to amount to $42.00; that

the agreed statement shows that that price per hundred was paid whether a man went with the cattle or not, which shows that nothing additional was paid if one did go.

The defendant further contends that as the contract is not corruptive of public morals nor promotive of crime, it in no just sense concerns the public nor contravenes its policy, and therefore should be upheld; that the risks and perils of transportation may be bargained against with the utmost propriety; and that if the defendant could take out a policy to indemnify it against accident to the intestate, it could agree with him that he should insure himself.

As to the contract being good as to the cattle and bad as to the man, that may well be; for the defendant does not stipulate for entire immunity from its own negligence as to the cattle, but only for immunity above the agreed valuation and above so much per carload in any event; and it has been held that such a contract is just and reasonable, because a proper and lawful way of securing a due proportion between the amount for which the carrier might be responsible and the compensation that he receives, and of protecting himself against extravagant or fanciful valuations, which is said to be quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants. *Hart* v. *Pennsylvania R. R. Co.* 112 U. S. 331; *Liverpool Steam Co.* v. *Phoenix Ins. Co.* 129 U. S., at p. 442. But this principle cannot, from its very nature, apply to the man, as to whom the stipulation is for entire immunity; and as the promise, whether one or two, if not wholly legal, is divisible, the good may stand and the bad fall.

As to the nature of the contract, we think the caretaker's contract is supplemental to the shipper's contract, and substantially a part of the same transaction, though executed afterwards, and based upon the same consideration, as is shown by

its language, which is, that "in consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the shipper's contract, without charge other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock he is in charge,—the undersigned does hereby voluntarily assume," etc. Substantially the same language is used in the shipper's contract where, "in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the live stock in his or their charge,"—the shipper agrees to indemnify the carriers against liability for their negligent injury to the caretaker. This, taken with the fact that the shipper was to feed and care for the cattle while in transit, which necessitated the carriage of a man for that purpose on the same train; and with the further fact that the contract nowhere refers to the caretaker's transportation as a free passage,—shows that the parties understood in the time of it what their language fairly imports, that the carriage of the man was a part of the contract for the carriage of the cattle, and that the "sum paid" or to be paid for carrying the cattle, was a consideration for carrying the man as well; and having treated it so then, they are bound by it now.

As to the contract not being against public policy, while some courts say it is not, this Court has said it is. Thus, in *Gillis v. Western Union Telegraph Co.* 61 Vt. 461, 17 Atl. 736, the question was whether it was just and reasonable in the eye of the law, and consistent with public policy, that a telegraph company should be allowed to stipulate for immunity from liability for its own and its servants' negligence in sending messages for the plaintiff. The Court likened the legal status

of such a company to that of a common carrier of passengers for hire, and held that it was not just and reasonable in the eye of the law, and was against public policy, to allow such a stipulation. So in *Davis & Gray* v. *Central Vt. R. R. Co.* 66 Vt. 290, 29 Atl. 313, it is said that under our decisions a common carrier may, by contract, limit his common law liability for goods entrusted to him, as far as it is just and reasonable in the eye of the law; but that it is not just and reasonable to allow such a servant of the public to contract for relief against his own negligence. In *Tarbell* v. *Rutland R. R. Co.* 73 Vt. 347, 51 Atl. 6, it was held to be against public policy for a railroad company to contract for immunity from liability for injury to its employees by its own or its servants' negligence. We think this the better doctrine, speaking generally, for the employment of a common carrier is a public employment. He must serve all who come. The law holds him to a very high degree of care and diligence; and when he stipulates not to be bound by that degree, he seeks to throw off the essential duties of his employment. It is said somewhere that this law has its foundation deep in public policy; that it is approved by experience, and sanctioned by the plainest principles of reason and justice; and that it is highly important that courts should not relax it.

As to the claim about insurance. A carrier of goods may get them insured against the usual risks; but that does not lessen his responsibility to the shipper, but rather increases his means of meeting that responsibility. *Phoenix Ins. Co.* v. *Erie Transportation Co.* 117 U. S., at p. 324. So here, the defendant's getting the intestate insured against accident, would not be stipulating for indemnity against its own negligence, but only for indemnity in case it was negligent; while stipulating with him to insure himself, would be nothing more than stipulating against its own negligence, which is quite a

different thing from the other. *Liverpool Steam Co.* v. *Phoenix Ins. Co.* 129 U. S. pp. 442, 443.

The intestate, therefore, was a passenger for hire; for it makes no difference that the consideration did not move from him, for it inured to him as a consideration when he came into the arrangement and contracted with the defendant on the strength of it. And the defendant was a common carrier as to the intestate, and not a private carrier, even under the Kimball case, for here was no procurement of the use of a car for carrying the man, as there was there for carrying the cattle, which seems to be the ground on which the Court based its idea of a private carrier. As to the soundness of the doctrine that a common carrier can by contract become a private carrier though his employment is not changed by the contract but only his liability, we have no occasion to express an opinion. That a common carrier can by contract limit his common law liability to some extent, is true; but can he do it in the circumstances of this case, and to the extent here claimed? This precise question has been answered in the negative by the Supreme Court of the United States in *Railroad Company* v. *Lockwood,* 17 Wall. 357. That was an action for damages for an injury to the defendant in error while travelling on the company's stock train. The defendant was a drover, and had cattle in the train. He was required to sign an agreement to attend to loading, transporting, and unloading them, and to take all risk of injury to them and of personal injury to himself or to whomsoever went with them. He received what was called a drover's pass, which certified that he had shipped sufficient cattle to pass free, but declared that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the cattle at less than

tariff rates. The defendant was injured in consequence of negligence on the part of the company or its servants.

The Court held that he was a passenger for hire; for though the pass certified that he was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying the cattle. It also held that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; and that these rules apply both to carriers of goods and carriers of passengers for hire, and with especial force to the latter. The Court purposely abstained from saying what the result would have been if the defendant had been a free passenger instead of a passenger for hire. But it is said that this case has been many times questioned, and that from the recent decisions of that Court it is clear that its views have undergone a change since then. A little examination will show how that is.

In *Railway Company* v. *Stevens*, 95 U. S. 655, the Court expressly based its decision on the *Lockwood* case, and said it had "no doubt of the correctness of the conclusion" there reached. In *Liverpool Steam Co.* v. *Phoenix Ins. Co.* 129 U. S. 397, 439-442, the Court analyzed the opinion in the *Lockwood* case, and said that it affirms and rests upon the doctrine that an express stipulation by a common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable, contrary to public policy, and consequently void; and that such had always been the understanding of that Court, expressed in several later cases; and that the case then before it was substantially determined by the *Lockwood* case.

The Baltimore & Ohio etc. R. R. Co. v. *Voigt,* 176 U. S. 498, is relied upon by the defendant to show that the Federal Supreme Court has changed its views since the *Lockwood* case. That is an express-messenger case. But the Court distinguished it from the Lockwood case, which, it said had been frequently followed, and might be regarded as establishing a settled rule of policy; that the principles therein declared are salutary, and the Court had no disposition to depart from them. In *Northern Pacific R. R. Co.* v. *Adams,* 192 U. S. 440, the question was whether a railroad company is liable in damages to a person injured through the negligence of its employees, who knows that he is riding on a gratuitous pass given on condition that the company should not be liable for such injuries; and it was held that the company was not liable, the Court distinguishing the case from the Lockwood case the same as it distinguished the Voigt case. Again, in *Caw* v. *Texas Pacific R. R. Co.* 194 U. S. 427, the Lockwood case is referred to approvingly.

Thus it appears that the Lockwood case has not only not been questioned by the Court that decided it, but has been frequently approved and followed, and is still regarded by that Court as establishing a settled rule of policy, from which it has no disposition to depart. That many of the state courts hold a different doctrine is true, and those are the cases upon which the defendant mainly relies. But many of the state courts hold the same doctrine. And this Court is committed to that doctrine. In the Gillis case, 61 Vt. 461, 17 Atl. 736, the *Lockwood* case was referred to as strong authority for the case then in hand, and its doctrine was there approved and applied.

We do not consider whether this contract contravenes V. S. 3924, which penalizes negligent injuries by engineers, fire-

men, or other agents of a railroad, for the plaintiff does not make the question.

The result is, we hold that a common carrier cannot lawfully stipulate for exemption from liability when such exemption is not just and reasonable in the eye of the law; and that it is not just and reasonable in the eye of the law, as it is against public policy, for a common carrier of passengers for hire to stipulate for such exemption in respect of the carriage from the negligence of itself or its servants.

Judgment affirmed.

In Re Almira E. Cowdry's Will.

October Term, 1904.

Present: Rowell, C. J., Tyler, Munson, Start, Watson, and Haselton, JJ.

Opinion filed March 9, 1905.

Wills—Undue Influence—Confidential Relations—Guardian and Ward—Presumptions—Testamentary Capacity—Adjudication as Non Compos—Adjudication of Mental Incapacity to Care for Self and Property—Evidentiary Effect.

A person who is adjudged a *non compos* and placed under guardianship as such, is thereby rendered *prima facie* incapable of making a will while the adjudication remains in force.

But a person who, under No. 58, Acts 1898, is merely adjudged incapable of taking care of himself and his property, and placed under guardianship as such, is not thereby rendered *prima facie* incapable of making a will while such adjudication remains in force.

In the trial of a case, a legal presumption should be used as a piece of evidence, and weighed as such, in behalf of the party in whose favor it operates, regardless of whether it arises from evidence, or exists independently of evidence.

The law presumes undue influence when a ward makes a will in favor of his guardian.

This presumption does more than shift the burden of proof in respect of undue influence, from the contestants to the guardian. It establishes, *prima facie*, the existence of such undue influence so as to defeat the will, unless and until it is overcome by counter proof, and should be used as a piece of evidence in favor of the contestants.

APPEAL FROM A DECREE OF THE PROBATE COURT establishing an instrument as the last will and testament of Almira E. Cowdry. George Wheeler, proponent. Henry C. Holmes and others, contestants. Trial by jury at the March Term, 1903, Washington County, *Stafford,* J., presiding. Verdict and judgment for the proponent. The contestants excepted. The opinion states the facts.

T. J. Deavitt, E. H. Deavitt, and *Senter & Senter* for the contestants.

The law presumes undue influence when a ward makes a will in favor of his guardian. *Breed* v. *Pratt,* 18 Peck 115; Richmond's Appeal, 59 Conn. 286, 21 Am. St. Rep. 85; *Meek* v. *Perry,* 36 Miss. 190; Note to *Thompson* v. *Thompson et al.* 1 Probate Rep. An. 117; *Garvin, Admr.* v. *Williams,* 46 Mo. 465, 100 Am. Dec. 314 and note; *Thompson* v. *Hawks, et al.,* 14 Fed. Rep. 902 and note; 1 Woerner Am. Law of Administration § 32; Worrall's Appeal, 1 Atl. Rep. 380 and note; *Wade* v. *Pulsifer,* 54 Vt. 45; *Moore* v. *Spier,* 80 Ala. 129; *Yardley* v. *Cuthbertson,* 108 Pa. St. 395.

George W. Wing, and *Plumley & Plumley* for the proponent.

The adjudication that the testatrix was incapable of caring for herself and property, does not render her *prima facie* incapable of making a will. *Robinson* v. *Robinson,* 39 Vt. 370; *Manley's Exr.* v. *Staples,* 65 Vt. 370; *Rice* v. *Rice,* 50 Mich. 448.

ROWELL, C. J. Before the passage of No. 58, Acts of 1898, the statute provided for the appointment of guardians only of spendthrifts, insane persons, and certain absconding persons. Section 2760 mentions such guardians by name, and defines their authority and control. Section 7 provides that the words, "insane persons," shall include every idiot, *non compos,* lunatic, and distracted person.

A person who is adjudged a *non compos,* and placed under guardianship as such, is thereby rendered *prima facie* incapable of making a will while the adjudication remains in force. *In re Wheelock's Will,* 76 Vt. 235, 56 Atl. 1013. The act of 1898 was passed as an addition to V. S. 2760, and provides that guardians of persons who have been adjudged mentally incapable of taking care of themselves or their property by the probate court appointing them, shall, until they are discharged, have the possession and management of the estates of their wards, and the care and custody of their persons, etc. It is apparent that it was the purpose of this amendment to enlarge the scope of the statute, and to add thereto a new class of persons over whom guardians could be appointed; and such must be taken to be its effect,—for it can have no other,—as it is not to be declared nugatory if it can be held effective. This amendment was undoubtedly prompted by the well known fact that many persons, and especially old persons, were willing to have a guardian, but were not willing to submit to an adjudication that would class them as insane, as was the case with this testatrix. Hence the

amendment recognizes a difference between a *non compos* and his class, and a person merely lacking mental capacity to take care of himself or his property. The mind of a *non compos* is to be taken, *prima facie,* as insane and nondisposing, while the mental incapacity of the amendment does not imply such a mind, but may well be taken, *prima facie,* to consist with a sound and disposing mind and memory. This case is a good illustration of the utility of the amendment. The testatrix was very old and infirm, and had long been a town charge. All at once and unexpectedly she fell heir to $6,000. No wonder she did not know what to do with it, nor how to take care of it. But this does not make against her mental soundness, but only against her mental ability to meet the requirements of her new condition, and hence the necessity of a guardian.

We hold, therefore, that the adjudication of her mental incapacity to take care of herself and her property, and the appointment of a guardian thereunder, did not render her *prima facie* mentally incapable of making her will.

The executor and proponent of the will is the principal beneficiary under it, and was guardian of the testatrix before and at the time the will was made. The contestants requested a charge that the law presumes undue influence when a ward makes a will in favor of her guardian, and views the act with suspicion. The court refused, but charged instead that the burden was on the guardian to show no undue influence on his part. This was not enough. The presumption of undue influence, which the law undoubtedly raised, did more than to take the burden of proof from the contestants and place it upon the guardian. It established, *prima facie,* the existence of such influence, and was sufficient to defeat the will unless and until it was overcome by counter proof, and should have been used as a piece of evidence, and thrown into the scale

and weighed as such in favor of the contestants. The nature, force, and effect of legal presumptions, and their proper place in the law, have been much discussed. The French Civil Code calls all presumptions, consequences that the law or the judge draws from a known fact to an unknown fact; and a legal presumption, one that a special law applies to certain acts or certain facts. Cachard's Translation, Articles 1349-1350.

Prof. Thayer says that disputable presumptions of law do not belong to the law of evidence, but to a much larger topic, the topic of legal reasoning in its application to particular subjects; that they are aids to reasoning and argumentation, and assume the truth of certain matters for the purpose of some given inquiry; that they may be grounded on general experience, or probability of any kind, or merely on policy and convenience; that on whatever basis they rest, they operate in advance of argument or evidence, or irrespective of them, by taking something for granted—by assuming its existence; and that the exact scope and operation of these *prima facie* assumptions are, to cast upon the party against whom they operate the duty of going forward in argument or evidence on the particular point to which they relate; but that they are not in themselves either argument or evidence, although for the time being they accomplish the result of both. Prelim. Treat. on Ev. 314.

But the Supreme Court of the United States takes a very different view of this question in *Coffin* v. *United States,* 156 U. S. 432, 452-460, where it is held on full consideration and without apparent dissent, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf; and this, upon the broad principle that all legal presumptions are evidence giving rise to resulting proof to the full extent of their legal efficacy.

This case is sharply criticised by Prof. Thayer on this point, who says that it cannot lay claim to the amount of learning and careful research that have been accorded to it, and is not entitled to its own claim of exactness of discrimination and searching and fundamental examination of the nature of the question, nor to the character of a leading and, in some degree, a final discussion of a peculiarly vexed and difficult subject. Prelim. Treat. on Ev. 566, 570.

Though it may be thought that the exposition and reasoning in the Coffin case counted for little in the mind of the Court in *Allen v. United States*, 164 U. S. 492, 500; yet in *Kirby* v. *United States*, 174 U. S. at p. 55, it will be seen that the Court adopted the doctrine of the Coffin case on this point, and held precisely the same thing. This is the latest utterance of that Court on this subject that we have seen, and would seem to settle the question there.

But whatever may be said as to the comparative merits of these two views, and it must be conceded that Prof. Thayer's has much to recommend it,—the view we have above expressed has become so embedded in our law that it is thought better to let it remain, as it works well enough in practice, and is sustained by the highest Court in the land and by many state courts.

Bradish v. *Bliss*, 35 Vt. 326, was trespass for purposely burning a barn. The court charged that the presumption of innocence was in the case, and had its influence, and that more proof was necessary to warrant a verdict of guilty than would otherwise be required, and enough more to overcome that presumption. This charge was sustained; and the Court referred to the then recent case of *Briggs* v. *Cooper*, unreported, where it was said to be held that the presumption of innocence is a matter to be weighed in favor of the party for

whom it operates, and to be overcome by the evidence of the other party.

Weston v. *Gravlin,* 49 Vt. 507, may not be in accord with *Bradish* v. *Bliss;* but in *Fire Association* v. *National Bank,* 54 Vt. 657, the holding in *Bradish* v. *Bliss* was approved and followed. There the request to charge was that the plaintiff must overcome, not only the defendant's evidence, but also the legal presumption of innocence of one Hopkins, which operated in favor of the defendant. The Court said the defendant was entitled to the charge called for by the request.

In *Childs* v. *Merrill,* 66 Vt. 302, 308, 29 Atl. 532, the defendant requested a charge that he was entitled to have the presumption of innocence weighed in his favor. The jury was told that the case must be disposed of "upon a consideration of all the facts and circumstances of the case appearing in evidence," thus excluding the presumption of innocence; and held error. The Court there said that *Weston* v. *Gravlin,* 49 Vt. 507, is not in accord with our other cases.

McKinstry v. *Collins,* 76 Vt. 221, 56 Atl. 985, was case for assault and battery of plaintiff's wife. The defendant justified under process as an officer, and requested a charge that the law presumes he did not commit the assault, and that he did his duty in serving the process, and that these presumptions stood with him until they were overcome by the evidence; and it was held that the request was sound law.

It is true that in the cases referred to the presumption considered was that of innocence, which exists without evidence, whereas here the presumption arises from the evidence. But that makes no difference, for both presumptions are based, in their policy, upon the probative strength, as matter of reasoning and inference, of the evidentiary fact that is assumed in one case and proved in the other; but the pre-

sumption is not the fact itself nor the inference itself, but the legal consequence attached to it, so they are equally rules of law in both cases, and to this extent the matter is in the hands of the court and not at all in the hands of the jury, and their essential character and operation, as far as the law of evidence is concerned, are the same in both cases.

Most of the other exceptions relied upon in argument are to the refusal of requests to charge, based upon the legal proposition contained in the request just disposed of, and are governed by that holding. Some of the other requests are manifestly unsound, and some were complied with as far as they ought to have been. But it is unnecessary to consider them in detail.

Reversed and remanded.

Munson, J., would embrace this opportunity to depart from the rule that has heretofore prevailed in this State, believing it to be incorrect; and therefore dissents on the second point.

Haselton, J., thinks a distinction should be made between presumptions, like the presumption of innocence, that exist independently of evidence, and presumptions that are generated by, or arise from, evidence; and therefore dissents on the second point.

TOWN OF JERICHO *v.* TOWN OF MORRISTOWN.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed March 9, 1905.

Paupers—Married Woman—Derivatives—Residence.

A person cannot acquire a residence, within the meaning of our pauper law, unless he is *sui juris*.

A married woman who lives with her husband in a town where he last resided for three years, supporting himself and family, does not thereby gain a residence in such town in her own right, nor derive one from her husband, so as to make such town liable to another town in which she lives for support furnished her as a pauper after the death of her husband.

ASSUMPSIT to recover for the support of a pauper. Plea, the general issue. Judgment, *pro forma,* for the plaintiff on an agreed statement of facts, at the September Term, 1904, Chittenden County, *Haselton,* J., presiding. The defendant excepted. The agreed statement alleges that the pauper was born in Illinois in 1860; that she came to Jericho, Vt., in 1881, and lived there with her parents till her marriage in June, 1887; that then she lived with her husband in said Jericho till December, 1896, when they both removed to Morristown; where they lived together till he died in February, 1900; that her husband had always supported himself and family; that she has remained a widow since his death; that she continued to reside in Morristown till April, 1900; that since then she has lived in several different towns in this State, but has resided a year in no one town; that in July, 1903, she moved into the town of Jericho, and in the same month became needy and was assisted by the plaintiff.

Frederick G. Fleetwood for the defendant.

The residence must be continuous and *sui juris*. *Brookfield* v. *Hartland*, 10 Vt. 424; *City of Montpelier* v. *Elmore*, 71 Vt. 193.

There is no such thing as a derivative residence under our pauper law. *Fairfax* v. *Westford*, 67 Vt. 390; *Danville* v. *Hartford*, 73 Vt. 300.

L. F. Wilbur for the plaintiff.

The pauper and her husband acquired a residence in Morristown, and her residence so acquired continues after his death till she acquires another. *Bethel* v. *Tunbridge*, 13 Vt. 446; *Royalton* v. *West Fairlee*, 11 Vt. 438; *Dalton* v. *Bernardston*, 9 Mass. 201; *Lake District Overseer* v. *So. Canaan Overseer*, 87 Pa. St. 19; *Stamford* v. *Readsboro*, 46 Vt. 611; *Buffalo* v. *Whitedeer*, 15 Pa. 182; *Hebron* v. *Colchester*, 5 Day 169; *Danby* v. *New Haven*, 5 Conn. 584; *Wells* v. *West Haven*, 5 Vt. 325; *Dedham* v. *Natick*, 16 Mass. 140; *Exeter* v. *Richmond*, 6 R. I. 149; *Kelly* v. *Owen et al.* 7 Wall. 496.

ROWELL, C. J. The question is, whether a married woman who lives with her husband in a town where he last resided for the space of three years, supporting himself and family, thereby gains a residence in such town within the meaning of the present pauper act, so as to make such town liable to another town in which she lives, for support furnished to her as a pauper after the death of her husband.

The plaintiff maintains the affirmative of this question on two grounds; (1) that a married woman thus living with her husband thereby gains a residence in her own right; (2) that if this is not so, then by the common law, which, it is claimed,

is not changed by the present act, she derives her husband's residence in such town.

As to the first ground. Neither at common law nor under our old settlement act could one gain a settlement by residence unless he was *sui juris;* and as a married woman is not *sui juris,* but under the disability of coverture, she could not thus gain a settlement in her own right. *Wells* v. *West Haven,* 5 Vt. p. 325; *Brookfield* v. *Hartland,* 10 Vt. 424. The same thing has been held under our present act in respect of unemancipated minor children for the same reason, and because they cannot be said to support themselves within the meaning of the act. *Marshfield* v. *Tunbridge,* 62 Vt. 455, 20 Atl. 106; *Danville* v. *Hartford,* 73 Vt. 300, 50 Atl. 1082.

Under our old settlement act, one must not only have resided in the town the requisite time to gain a settlement by residence, but must have "maintained himself or herself;" and force was given to this last requirement in *Brookfield* v. *Hartland,* where it is said that a married woman living with her husband can with no propriety be said to maintain herself. And this is as true of a married woman under the present act as it was under the old act, and as it is of unemancipated minors under the present act.

As to the second ground. We do not regard this as an open question under the present act. It is settled by *Fairfax* v. *Westford,* 67 Vt. 390, 31 Atl. 847. There the father of the pauper, who was an imbecile, had a residence in the defendant town, but the pauper had none there in his own right because of nonemancipation. The father was dead, and the pauper was the poor person in need of assistance for himself, and to whom it was furnished. Held, that there could be no recovery, because the pauper did not derive his father's residence, and had not acquired one in his own right. The Court expressly said that he did not take his father's residence, and

that to maintain an action under the present act, it must appear that the poor person to whom, or to whose family, assistance has been rendered, has a residence in the defendant town in his own right.

The same thing is said in *Danville* v. *Hartford,* 73 Vt. 300, 50 Atl. 1082. There the pauper's father gained a residence in the defendant town while the pauper was unemancipated. The Court said that the pauper being unemancipated during her stay in that town, never resided there within the meaning of the statute, and that the defendant was not chargeable by reason of her stay there; and that the defendant was not chargeable by reason of the residence of the pauper's father, for he died long before the pauper came to want, and was never a poor person in need of assistance, and that the pauper having no residence in her own right, no action could be maintained by a town for her support, unless she was a member of a family then in existence, the head of which was in need of assistance for himself or his family; and that the pauper act does not provide for a derivative residence. Cf. *City of Montpelier* v. *Elmore,* 71 Vt. 193, 44 Atl. 71.

We hold, therefore, that a married woman who lives with her husband in a town where he last resided three years, supporting himself and family, does not thereby gain a residence in such town in her own right, nor derive one there from her husband, so as to make such town liable to another town in which she lives, for support furnished to her as a pauper after the death of her husband.

Judgment reversed, and judgment for the defendant to recover its costs.

CHARLES L. KING *v.* HENRY F. ESTABROOKS.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Opinion filed March 9, 1905.

Malicious Suit—Declaration—Sufficiency.

In an action for malicious suit, when the declaration alleges that the suit was instituted without probable cause and that a judgment therein was procured by fraud, but the fraudulency of the judgment is not declared upon as a cause of action, the declaration is not bad for duplicity.

In an action for malicious suit, what is probable cause is a question of law; and a declaration which charges merely the institution of the suit without "reasonable or probable cause of action" is bad on demurrer, for the facts should have been set out, that the court may see whether there was want of probable cause.

In an action for malicious suit, the declaration alleged that the defendant fraudulently and without reasonable or probable cause, brought trover against the plaintiff; that the plaintiff, as defendant therein, appeared on the return day ready for trial, but that the defendant, as plaintiff therein, told him he need pay no more attention to the case, and that the defendant would go to the plaintiff's place and get the property sued for, which the plaintiff told him he had, and was and always had been ready to deliver to him; that the plaintiff thereupon went home, relying on what the defendant had said, and paid no more attention to the case; that after the plaintiff went home defendant caused the case to be continued without the knowledge or consent of the plaintiff, until finally defendant caused a judgment by default to be entered therein, and the damages to be assessed at a large sum, and a certified execution to be issued, of all of which the plaintiff was ignorant until he was arrested on the execution and committed to jail. *Held*, that these allegations sufficiently impeach the judgment for bad faith and dishonesty in procuring it to overcome its effect as proof of probable cause.

CASE for malicious suit. Heard on demurrer to the new count of the declaration at the June Term, 1904, Caledonia County, *Watson,* J., presiding. Demurrer sustained. The plaintiff excepted. The opinion states the substance of the count.

May & Hill, and *R. W. Simonds* for the plaintiff.

Porter & Thompson for the defendant.

Want of probable cause is a question of law. The pleader should allege fact from which the court may judge whether there was want of probable cause. *French* v. *Smith,* 4 Vt. 363; *Barron* v. *Mason,* 31 Vt. 189; *Driggs* v. *Burton,* 44 Vt. 124; *Stewart* v. *Sonneborn,* 98 U. S. 187, 25 L. Ed. 116; *Stone* v. *Crocker,* 24 Pick. 81; *Anderson* v. *How,* 116 N. Y. 336, 22 N. E. 695; *Roberts* v. *Kendall,* 12 Ind. App. 269, 38 N. E. 424; *Bell* v. *Atlantic City R. Co.,* 58 N. J. L. 227, 33 Atl. 211; *Stearns* v. *Stearns,* 30 Vt. 213; *Alabama* v. *Burr,* 115 U. S. 413, 426; 12 Enc. of Pl. & Pr. 1020; *Mure* v. *Kaye,* 4 Taunt. 34; *Closson* v. *Staples,* 42 Vt. 209; *Giusti* v. *Del Papa,* 19 R. I. 338, 33 Atl. 525; *Spencer* v. *Anness,* 32 N. J. L. 100; *Brown* v. *Cape Girardeau,* 90 Mo. 377, 59 Am. Rep. 28; *Wright* v. *Bourdon,* 50 Vt. 494; *Brainard* v. *Van Dyke,* 71 Vt. 359.

ROWELL, C. J. This is case for a malicious suit. The new count, which is the only one in question, alleges that the defendant, not having any reasonable or probable cause of action, brought trover against the plaintiff, returnable before a justice, and caused him to be arrested and imprisoned on the writ; that the plaintiff appeared on the return day, ready for trial, but that the defendant told him he need pay no more attention to the case, and that the defendant would go to the

plaintiff's place and get the property sued for, which the plaintiff told him he had, and was ready and willing, and always had been, to deliver to him; that the plaintiff thereupon went home, relying on what the defendant had said, and paid no further attention to the case; that after the plaintiff went home, the defendant caused the case to be continued without the knowledge or consent of the plaintiff, and in like manner caused it to be further continued from time to time until at last the defendant caused a judgment by default to be entered therein and the damages to be assessed at a large sum, and a certified execution to be issued, of all which the plaintiff was ignorant until he was arrested on the execution and committed to jail. The count alleges that the defendant did all this fraudulently, without probable cause, for the purpose of further imprisoning, harassing, and oppressing the plaintiff; that the plaintiff brought his petition for an appeal on the ground of fraud, accident, and mistake, and prevailed, and entered his appeal in the county court, whereupon the defendant, at the next term, discontinued his case and paid the plaintiff's costs, whereby the case was finally ended.

It is objected that said count is double because it alleges a malicious suit and a fraudulent judgment, and therefore sets up two causes of action. But, as the plaintiff contends, the fraudulency of that judgment is not declared upon as a cause of action, for it was necessary to set up the judgment, and to show that it was vacated and the suit finally ended in favor of the plaintiff. And being set up,—not considering whether a voluntary discontinuance is sufficient evidence of want of probable cause and malice to justify a finding of both, which some of the cases hold and others deny; and not considering what the plaintiff now claims, that as the hearing before the justice was *ex parte,* the judgment has no binding force, on which he was not bound to rely in pleading,—it was

necessary to impeach it by showing the undue means by which it was procured, for otherwise the count would destroy itself, as the judgment would be proof of probable cause. 1 Am. Lead. Cas., 5th ed., *276*, *277*; *Burt* v. *Place*, 4 Wend. 591; *Spring* v. *Besore*, 12 B. Mon. 551; *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141; *Giusti* v. *Del Papa*, 19 R. I. 338; *Closson* v. *Staples*, 42 Vt. 209.

This brings the case within the rule that no matters, however multifarious, make a pleading double if, when taken together, they constitute but one proposition or entire point.

But the count is bad in substance, for what is want of probable cause is a question of law, and therefore it is not enough to allege, as here, merely want of "reasonable or probable cause of action," for that is only matter of law; but the facts should have been set out, that the court may see whether there is want of probable cause, and there is no allegation that amounts to setting out such facts. *Driggs* v. *Burton*, 44 Vt. 124, 146. In *Closson* v. *Staples*, 42 Vt. at page 225, it is said to be clear that an averment of want of probable cause is not sufficient without alleging facts showing such want. It is like pleading fraud, where it is not sufficient merely to allege that a thing is fraudulent, however strongly you may characterize it as such, for that is but the pleader's opinion, which the law will not regard, but requires that what is relied upon to constitute the fraud shall be set out, that the court may judge of the matter.

But it is claimed that the judgment conclusively proves probable cause, because it is said that although it is alleged that it was procured by fraud, the facts relied upon to show fraud are not set out. But the allegations sufficiently impeach the judgment for bad faith and dishonesty in procuring it, to overcome its effect as proof of probable cause. *Burt* v. *Place*, above cited, is much in point on this question.

There the declaration alleged that the suits commenced before the magistrate were decided against the plaintiff; but it was held that that admission was sufficiently countervailed by the further allegation that the defendant, well knowing that he had no cause of action, prevented the plaintiff from procuring the necessary evidence to make out his defence by causing him to be detained as a prisoner until the judgments were rendered, and that the imprisonment was for the purpose of preventing a defence.

Affirmed and remanded.

OUGHTNEY JANGRAW *v.* JOSEPH PERKINS.

October Term, 1904.

Present: TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed April 5, 1905.

Bastardy—Intermarriage of Parties—Third Party's Security for Support—Mortgages—Validity—Public Policy.

Marriage between a pregnant single woman and her seducer is especially favored and encouraged by the law; and his contracts made in contemplation of such marriage are valid.

The seducer of a pregnant single woman, who had instituted bastardy proceedings against him, offered to marry her, and, in order to induce her and her father to consent to the marriage and to dismiss said proceedings, defendant executed a mortgage conditioned that the prospective husband should support his wife and her child, and not desert them. *Held*, that such mortgage is not contrary to public policy, and on breach of the condition is enforceable.

APPEAL IN CHANCERY. Heard on demurrer to the amended bill of complaint at the March Term, 1904, Washington County, *Rowell,* Chancellor. Demurrer overruled; bill adjudged sufficient and taken as confessed. The defendant appealed.

This case has been once before in the Supreme Court. See 76 Vt. 127. The opinion states the substance of the amended bill.

The condition of the mortgage is as follows:

"WHEREAS, Harvey Revett, now of Montpelier, in the County of Washington and the State of Vermont, is about to contract marriage with Mary E. Jangraw, daughter of Oughtney Jangraw, both of Montpelier, in the County of Washington and State of Vermont. Now THEREFORE, The conditions of this deed are such that if the said Harvey Revett shall immediately marry the said Mary E. Jangraw, and shall, to the best of his ability, for the term of six years, be to her a good and faithful husband, support her and her children to the best of his ability and otherwise conduct himself as a husband should to a wife, and shall fulfill the terms of the marriage contract, then this deed shall be null and void; but if the said Harvey Revett shall not well and faithfully perform the acts and things hereinbefore set forth to be by him performed during the said term of six years from the date of this deed, then the said Joseph Perkins shall, within three months after the first breach of said conditions on the part of the said Harvey Revett pay to the said Oughtney Jangraw the sum of Five Hundred Dollars, to be by said Oughtney Jangraw held in trust for the support, care and maintenance of the said Mary E. Jangraw and any children of her body then living; but if the said Harvey Revett shall well and faithfully maintain and support his wife according to the conditions hereinbefore set forth, but shall decease before the expiration of

said six years, then his death, provided he has fulfilled the conditions above set forth, shall avoid this mortgage. If all the conditions of this deed, as above set forth, are fully complied with, then this deed shall be null and void, and it shall be null and void at the end of six years by its own limitation, otherwise in full force and virtue. And the said Harvey Revett also agrees that, commencing on the 1st day of January, 1902, he will deposit in the Montpelier Savings Bank and Trust Company, at Montpelier, on the first day of each month, during the year 1902, the sum of Four and 25-100 Dollars, and for the five years following 1902 he is to deposit the sum of Six and 25-100 Dollars on the first day of each month, in each of said years, said sums to be deposited in the name of his wife, whose name will then be Mary E. Revett, to be in trust for her and her children for the full term of six years, and it is a condition of this mortgage that the amount of money so by him deposited, as fast as deposited, shall reduce the amount of this mortgage, that is, the amount so deposited, in case of a breach of the conditions of this mortgage, shall be applied to reduce the Five Hundred Dollars' penalty to be paid by said Joseph Perkins."

R. M. Harvey and *E. M. Harvey* for the Orator.

The mortgage, in the circumstances revealed by the amended bill, is not against public policy. Greenhood on Public Policy § § 482-483; *Farnum* v. *Bartlett,* 52 Me. 570; *Wyant* v. *Lesher,* 23 Pa. St. 338; *Wright* v. *Wright,* 114 Iowa 748; *O'Connell* v. *Noonan,* 1 App. Cas. (D. C.) 332; *Hann* v. *Crickler,* 43 Atl. 1063; *Thayer* v. *Spear,* 58 Vt. 327; Ray on Contractual Limitations, § 30; *Born* v. *Horstman,* 80 Cal. 454; *Barrett* v. *Barden,* 65 Vt. 431; *Reamey* v. *Bayley,* 11 Atl. 438; *Wright* v. *Wright,* 141 Iowa 748; 55 L. R. A.

261; *Squires* v. *Squires,* 53 Vt. 208; *Clark* v. *Fosdick,* 6 L. R. A. 132.

Heaton & Thomas and *Frank S. Williams* for the defendant.

Even in the circumstances revealed by the amended bill, the mortgage is void as being a marriage brokerage contract. This vitiating element still remains, viz.: that the mortgage is conditioned that the mortgagor should bring about the marriage. *Jangraw* v. *Perkins,* 76 Vt. 127; Anderson's Dictionary of Law 688; *Tuttle* v. *Armstead,* 53 Conn. 175 at 181; *Mitchell* v. *Burnham,* 44 Me. 299; *Cook* v. *Bartholomew,* 60 Conn. 24; *Crawford* v. *Bussell,* 62 Barb. (N. Y.) 92; *Hall and Keen* v. *Potter,* 3 Lev. 412; *Johnson, Admr.* v. *Hunt,* 81 Ky. 321; *Dunval* v. *Williams,* 124 N. Y. 156; Albany Law Journal, Vol. 48, Page 508; Parsons on Contracts, 5 Ed. Vol. 2, page 74; Addison on Contracts, Morgan's Ed. Vol. 3, page 441, § 1394; *Stribblehill* v. *Brett,* 2 Vern. 445, *White* v. *Equitable Nuptial Benefit Union,* 76 Ala. 251; *Morrison* v. *Rogers,* 56 Am. St. Rep. 95; *Debenham* v. *Ox,* 1 Ves. Sen. 276; *Boyden* v. *Hubbard,* 7 Mass. 119; *Fuller et al.* v. *Dane,* 18 Pick. 472 at 481.

The mortgage is also void because it compels Revett to make the monthly deposit mentioned in the condition. Such an undertaking tends to deprive the family of the earnings of the husband, and for that reason is against public policy. *Hawke* v. *Enyert,* 30 Neb. 149; *Potter* v. *McAlpine,* 3 Dem. (N. Y.) 108 at 123; 33 Mich. 78.

POWERS, J. When this case was here on a demurrer to the original bill—*Jangraw* v. *Perkins,* 76 Vt. 127, 56 Atl. 532,—it was held that the contract set forth therein was contrary to public policy and void. The cause was remanded, the

bill has been amended, and the sufficiency of the amended bill is now submitted to our determination.

The facts now shown by the record, so far as it is necessary to recite them, are as follows: Mary Jangraw, the unmarried minor daughter of the complainant, being pregnant, instituted bastardy proceedings against one Revett, and caused his arrest thereon. Revett gave bail, acknowledged that he was the father of the child, and offered to marry the girl. Mary and her father objected to the marriage and the discharge of the bastardy proceedings, unless Revett gave security for the support of the mother and child. Thereupon, the defendant, a relative of Revett's, at Revett's procurement, executed the mortgage here in question, and agreed to deliver the same to the complainant upon the marriage of Mary and Revett and the discontinuance of the bastardy proceedings. Relying upon this mortgage, the complainant and his daughter consented to the marriage; the ceremony was performed, the bastardy proceedings discontinued, and the mortgage delivered according to the agreement. After a time, Revett deserted his wife and child, and neglected and refused to care for and support them.

This is an entirely different case than was before presented. The new allegations relieve the contract of its objectionable features, and the rule which controlled the case as made by the original bill does not now apply. A marriage between parties situated as these were is especially favored and encouraged by the law,—not only that the most appropriate recompense may be afforded and the most effectual reparation may be made, but that the offspring may be made legitimate,—and the contracts and undertakings of the seducer made in contemplation of such a marriage are valid and binding. Bish. Cont. § 511.

In *Wyant* v. *Lesher, et al,* 23 Pa. St. 338, John Lesher, one of the defendants, addressed the daughter of the plaintiff, and she being pregnant, he refused to marry her, and a prosecution was instituted against him. After his arrest, he proposed to marry the girl, and the plaintiff required from him security that he would treat her well and not desert her. He thereupon gave a bond, with surety, the condition of which was that "he treats her as a loving and affectionate husband ought to do, and not to desert her,"—the penalty being payable to the plaintiff for the use and support of the daughter and her heirs,—and the father consented to the marriage. The action was on the bond. It was urged in behalf of the defendants that the bond was without consideration, and was against public policy and void. Both points were ruled in favor of the plaintiff. "I see no more tendency," said the Court, "in such a contract as this bond, to disturb the harmony of conjugal life than in a marriage settlement, or in articles entered into after marriage looking to a future separation. This husband stipulated simply for the performance of his duty, and a faithful discharge of that was the surest way to preserve peace in his family. Among the most imperative of the duties assumed in the marriage contract, were the support and maintenance of his wife and child, and for these it was prudent in her father to exact from him a security additional to the marriage vow."

In *Wright* v. *Wright,* (Ia.) 55 L. R. A. 261, the plaintiff had given birth to an illegitimate child of which the defendant's son was the father. She afterwards entered into a written agreement of marriage with the younger Wright. At the same time, and as a part of the same transaction, the defendant executed a written agreement with the plaintiff which contained the following provision: "If she (the plaintiff) shall marry said Edward Wright on this day, and per-

form the duties of a wife to said Edward Wright to the best of her ability, and said Edward Wright should forsake her or her child, Edward Wayne Wright, * * * * then I will furnish a home for her and said child." The husband deserted the paintiff, and suit was brought on the contract. It was insisted in defence that the contract was without consideration and was contrary to public policy. Judgment was given for the plaintiff in the lower court, and in affirming that judgment the Court quotes approvingly from the opinion in *Wyant* v. *Lesher, supra.*

Armstrong v. *Lester, et al,* 43 Ia. 159, was an action on the following contract: "One day after date I promise to pay Russell Armstrong for the use of Isabel Nicholson, or the child with which she is now pregnant and of which the principal hereof is the father * * * the sum of five hundred dollars. * * * Provided that if A. W. Lester, principal, shall marry and in good faith live and abide with and support Isabel Nicholson, and support and keep and care for the child with whieh she is now pregnant and of which he is the father, no part of this note shall become due or payable; but if he should not marry, or, having married, leave or abandon her for any cause, * * * this note shall become and shall be considered due * * *."

(Signed) A. W. LESTER, Principal.
H. W. LESTER. } Sureties.
J, T. LESTER, }

The sureties defended. After holding that the consideration was sufficient, the Court says: "It is urged that the contract is illegal and against public policy. But an obligation whereby one secures a provision made for a wife and child so far from being illegal, is regarded with favor by the law. * * * * Marriages celebrated under such circumstances are encouraged by the law. All settlements and contracts en-

tered into in contemplation of such marriages, which have been fairly made and would under other circumstances be upheld, cannot be defeated."

The new allegations of the bill bring the case under consideration squarely within the authority of these cases,—the reasoning of which is satisfactory and decisive.

Decree reversed, pro forma, demurrer overruled, bill adjudged sufficient, and cause remanded, with costs in this Court to the complainant.

WILLIAM STANDLICK, ET AL. *v.* OSCAR DOWNING.

January Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 3, 1905.

Trover—Evidence—Tenant of Mortgagor—Vendee of Mortgagor—Right to Hay Cut After Foreclosure.

The defendant, as lessee of the mortgagor of a farm, cut hay thereon after the title of the mortgagee became absolute by foreclosure. *Held*, that the plaintiff, who acquired title to the farm from the mortgagee after the decree of foreclosure became absolute, in order to recover for conversion of the hay must show that it was cut after he got title to the farm, or that he purchased the hay with the farm.

TROVER for hay. Plea, the general issue. Trial by court at the June Term, 1903, Orange County, *Munson*, J., presiding. Judgment for the defendant. The plaintiff excepted.

Neither the lessee of the mortgagor nor any one claiming under her was made a party to the foreclosure suit mentioned in the opinion. The opinion states all that the trial court found in respect of when the hay in controversy was cut.

David S. Conant and *Smith & Smith* for the plaintiff.

The lessee of a mortgagor under a lease executed after the mortgage is not entitled, as against the mortgagee, to crops growing on the mortgaged premises at the time of foreclosure. *Lane* v. *King,* 8 Wend. 584; *Howell* v. *Schenck,* 24 N. J. 89; *Rogers* v. *Humphreys,* 4 A. & E. 299; Jones on Mtgs., § 687; *Doward* v. *Geoff,* 40 Ia. 597.

R. M. Harvey for the defendant.

The lessee had such an interest in the farm that, unless made a party to the suit of foreclosure, she was unaffected by the decree. 2 Story Eq. 1023; 2 Jones Mtgs. § § 1394-1414; *Emeric* v. *Alvarado,* 90 Cal. 444.

TYLER, J. Trover for a quantity of hay; plea, general issue with notice of a lease; trial by the court. The facts found are that the title to and right of possession of the farm became absolute in the mortgagee July 15, 1902, by virtue of a decree of foreclosure of his mortgage, and that on August 9, 1902, he conveyed the farm to the plaintiffs. The defendant was then in possession under a lease given the March before by the mortgagor, for one year, to Mrs. Downing, who in April sublet the farm to Merritt and Gavlin. The lease was not recorded till May 20. Mrs. Downing was the mortgagor's mother and the defendant's wife. When the mortgagee brought his foreclosure suit he knew that Merritt and Gavlin were in possession of the farm, and that it was claimed that there were leases of the property. The plaintiffs knew of both

leases when they bought the property. They did not attempt to take possession under their deed till August 27, at which time the defendant was in charge of the property for his wife, who had settled with Merritt and resumed possession. The hay in controversy was cut between July 15 and August 27, and on the latter date it was stored in the buildings on the premises.

The burden was on the plaintiff to show that hay was cut upon the premises after August 9, 1902, but he failed to establish that fact which was essential to his right of recovery. Nor was it found that the plaintiff purchased any cut hay with the farm, nor that either the hay that was drawn away at the time it was cut, nor that which was stored upon the premises on August 27th, was cut after the plaintiff's purchase of the farm. No right of action is shown.

Judgment affirmed.

STATE *v.* JOSEPH BEAN.

January Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 13, 1905.

Criminal Law—Homicide—Evidence—Proof of Conspiracy—Former Attempts—Accomplice—Corroboration—Experiments.

The admission of immaterial evidence does not vitiate, if it can be said not to have harmed the excepting party.

In a prosecution for murder, the State claimed that the respondent killed the deceased out of jealousy and in order to end the latter's improper relations with a certain married woman; and a witness for the State testified that the respondent tried to hire him to act as detective, and spy upon the deceased and the woman; and then testified in regard to a trip that he made with the respondent, and stated that in the course of the journey they went to the depot, and then answered, subject to exception, that he then went to the doctor's, but that respondent did not go. *Held*, that the testimony excepted to was without significance, and its admission was harmless.

After this witness had testified that he consented to act as such detective, and that the respondent undertook to provide him with money, it was proper to allow him further to testify that, by the respondent's direction given in the witness's presence, the witness received from a third person an order for $3.

This witness further testified that he went to the woman's house, as respondent desired, and received from her a letter which respondent wanted he should get; and which the witness read there, carried away, read to the respondent, and gave to him. *Held*, that the testimony as to the witness reading the letter, however immaterial, was harmless.

Whether relevant testimony is too remote in time or place is a preliminary question for the trial court, and will not ordinarily be revised.

When the declarations of a party are given in evidence against him, all that he said upon the subject at the same time must be received and weighed.

For the purpose of showing motive on the part of the respondent and that he killed the deceased out of jealousy and in order to end the latter's improper relations with a certain married woman, a witness for the State testified that he met the respondent and questioned him about a pair of horses belonging to the respondent, and that the respondent replied that all the woman's family had seen the horses, except her husband who was then in Canada; and that the respondent then added that he supposed the deceased and the woman were going to Canada on a visit when her husband got back; that he had heard they were, but did not know. *Held*, that the testimony was admissible as tending to show that the respondent was brooding over the relations between the deceased and the woman.

A witness for the State testified that, shortly before the homicide, the respondent stated in answer to a question that, if deceased remained at the woman's home, it would be doubtful about the witness getting his pay continually from her husband. *Held*, that the circumstances in which this answer of the respondent was given go only to the weight of the evidence, and that the contention that the answer was in response to a confidential inquiry will not be considered, it not appearing that the inquiry was confidential, nor that this objection was made in the trial court.

Prior attempts by one to commit a crime for which he is being tried are evidence against him, although the crime was not finally committed by the same means used in such prior attempts.

Certain testimony *held* to corroborate that of a witness who testified in detail to two expeditions with the respondent, undertaken for the purpose of executing a conspiracy—not consummated—between himself and the respondent to kill the deceased.

The respondent having introduced evidence tending to show that a witness for the State had been influenced by threats of imprisonment to testify that there had been a conspiracy between himself and the respondent to kill the deceased, it was competent for the State to show that he made similar statements before the alleged threats.

It appeared that the deceased received his death blow in the evening at his barn near a certain house. A son of the householder testified that he saw a man that evening looking in at the kitchen window who he thought was the respondent, though he could not swear positively. Later respondent introduced evidence of an experiment made the evening of the homicide, when the son went out and stood by the window, and his mother stood in the same place he had, and looked out of the window, and she was then asked if she looked "to see if she could tell who was out there"; and she answered, "No; I saw some one there, but could not see who it was." *Held*, that, as it did not appear that the respondent, in the time of it, disavowed the irresponsive part of the answer, but was letting it stand for what it was worth, it was not error to permit the State to give evidence in regard to such an experiment, since the court might well have regarded the door open for rebuttal.

Where, on a prosecution for murder, a witness for the State had testified that there had been a conspiracy between himself and the respondent to kill the deceased, it was material for the State to

show that this witness was where he could not have killed the deceased, since it would have been legitimate argument that this witness might have committed the crime.

On a prosecution for murder, the State claimed that deceased was killed by blows on the head with a stake from an old hay rack, which stake the respondent took from the house of H., and which, in his flight back, he threw into the bushes, where it was found. H. testified that he once had an old-fashioned hay rack, with bed pieces, raves, and stakes, and described how the raves were held up by stakes. Another stake was introduced in evidence, concerning which another witness testified that shortly after the homicide he saw under H.'s carriage shed the raves of an old hay rack, with holes bored through them, evidently to set down onto stakes; that he measured the holes the Sunday before he testified and then saw the stakes there. *Held*, that the admission of this evidence and the introduction of the second stake was not error, as this stake connected the respondent with the other stake by tending to show that it came from H.'s.

On a prosecution for murder, though the charge of the court be construed as limiting the jury to a consideration of the matter solely as presented by the arguments of counsel, based on the evidence, error is not apparent when it does not appear that counsel did not present the matter in every view warranted by the evidence.

On a prosecution for murder, the theory of the defence was that deceased had met his death through some accident; and the court charged that, if the jury failed to find that the death was caused by human agency, that would end the case in favor of the respondent, but that if they considered that "the theory of accidental death cannot be reasonably entertained on the evidence," there remained the question whether the respondent inflicted the injuries. *Held*, that there was no error in the manner of submitting the question of accidental death; the court having instructed as to the burden of proof and reasonable doubt, and having told the jury that, the evidence being circumstantial, it must be such as to exclude every reasonable theory consistent with innocence.

INDICTMENT FOR MURDER. Plea, not guilty. Trial by jury at the December Term, 1903, Windsor County, *Munson*, J,. presiding. Verdict, guilty of murder in the second degree;

judgment and sentence thereon. The respondent excepted. The opinion fully states the case.

W. B. C. Stickney for the respondent.

As Root's death was not claimed to have resulted from the conspiracy between Martel and the respondent, the State should have been limited to showing the existence of the conspiracy, and should have been prohibited from showing acts of Martel claimed to have been done in pursuance of the conspiracy. *Com.* v. *Campbell,* 7 Allen 541; *Schaffner* v. *Com.,* 72 Pa. St. 65; *Martin* v. *Com.,* 93 Ky. 189.

The professed corroboration of Martel, who was a confessed accomplice, in respect of his trip over the mountain in pursuance of the conspiracy, was not corroboration in regard to material facts, and so inadmissible. *Com.* v. *Bosworth,* 22 Pick. 397; *Ormsby* v. *People,* 53 N. Y. 475; *People* v. *Plath,* 100 N. Y. 590; *Com.* v. *Holmes,* 127 Mass. 424.

Clarke C. Fitts, Attorney General, *Charles Batchelder,* State's Attorney, *Herbert H. Blanchard* and *John G. Sargent* for the State.

ROWELL, C. J. The prisoner is under conviction of murder of the second degree for killing Ephrain Root on October 12, 1903. It appeared that Root lived at John Green's at the time of the homicide, and that the prisoner had made it his home there for about eighteen years next before June, 1903.

The State claimed, and its testimony tended to show, that Root had so ingratiated himself into the favor of Mrs. Green, John Green's wife, as to interrupt the prisoner's improper relations with her, and that the prisoner slew him, to get rid of him.

Chatfield, a witness called by the State, told of a trip to Rochester that he made with the prisoner one day in the fall of 1903, and testified that in the course of the journey they went to the depot, and was then asked where they went next, and answered, subject to exception, that he went to the doctor's, but that the prisoner did not go; that the witness got out at the corner, and the prisoner went along. The witness had testified that the prisoner had tried to get him to go to Green's as a detective, and told him there was a fellow staying there that the Green boys wanted to get out; that there had been a detective up there, but some one saw his badge, and he went away the next morning; that the witness declined to go. It is claimed that the testimony objected to was altogether immaterial, and, in view of the effort of the State to identify the witness with the prisoner, and to hold the prisoner responsible for the witness's actions, its admission was prejudicial, as tending to create a false issue and to mislead the jury. But the admission of immaterial evidence does not vitiate if it can be said not to have harmed the excepting party; and this testimony was so completely without significance that it is clear it could not have harmed the prisoner in the respects suggested nor otherwise.

The witness further testified that he finally consented to go to Green's as the prisoner requested, and that on a Tuesday morning the prisoner took means to get some money for him to go with; and subject to exception he said that he received an order for three dollars from Mr. Belden by the prisoner's direction, given in the witness's presence. It is objected that this was error, for although it may have been permissible for the State to show the employment of the witness, and that he was paid by the respondent, the details were immaterial, and tended to divert the minds of the jury from the main issue, and to prejudice them against the prisoner.

But as the obtaining of the money was a part of the transaction of procuring the witness to go to Green's as a detective, it was proper to show the fact of obtainment by detailing the manner of it. This is not like excluding the details of a quarrel, to which it is likened, for there the only question is whether the witness is hostile to the opponent, not how it arose nor who was to blame; and as the details of the quarrel do not explain away the hostility, and may unfairly prejudice the opponent, they are not admitted, 2 Wig. Ev. § 952, (2).

The witness further testified that he went to Green's as the prisoner desired, and there said and did what the prisoner directed him to, and told what that was; that he there saw and talked with divers persons, whom he named, and among them, Mrs. Green, from whom he received a letter that the prisoner wanted he should get, and which he read there, carried away, read to the prisoner, and gave to him, telling him all he had said and done. The letter was produced, and the prisoner admitted that he procured it to be written. To the witness's saying that he read the letter there, the prisoner excepted, as immaterial and prejudicial. It is enough to say that the mere fact that the witness read the letter there, and to himself it would seem, however immaterial, signified nothing, and could not have been harmful.

For the purpose of fixing the dates of certain transactions between the prisoner and the witness Chatfield, one Stockwell testified for the State that on September 29th he let Chatfield have $3.00, which he charged to Farr & Kennedy, and which was paid to him on October 3d. To the admission of this testimony the prisoner excepted as too remote. But whether testimony, relevant in its nature, is too remote in time or place, is a preliminary question for the trial court, and will not, ordinarily, be revised. *Dover* v. *Winchester*, 70 Vt. 418, 41 Atl. 445; *State* v. *Doherty*, 72 Vt. 381,

390, 48 Atl. 658. Nothing appears here that calls for a revision of that question.

The State introduced evidence tending to show that in the summer or fall of 1903, a stranger came to Mrs. Wiley's house,—where Root lived before going to Green's,—and stayed there two or three days, having no apparent business, but remaining in the house most of the time, apparently watching the premises, and particularly Green's house; and it was claimed that the prisoner procured this man to go there for the purpose of frightening Root and Mrs. Green, and thereby breaking up their intimacy, which, the State claimed, excited the prisoner's jealousy. The only evidence claimed to have any tendency to show the stranger's business was that of the prisoner's statements to various witnesses. To show the prisoner's connection with the alleged detective, and his motive and purpose to get Root out of the way, Mrs. Huntley, a witness for the State, testified, among other things, that the prisoner told her that he had met a detective, who offered him fifty dollars to say anything against Mrs. Green's character; that he told the detective he knew nothing about her character, and should have nothing to say if he did; that he had been up to Mrs. Green's, and she asked him to say nothing about it, and cried, and told him they were going to make trouble for her and Root, and wanted him to put in money to help her; that he heard that Mrs. Wiley had a couple of detectives watching Root and Mrs. Green, and that the first thing the witness would hear there would be one of them killed; that he asked Mrs. Green why she did not send Root away, and she said that Root had always been a dog for everybody, and she should not turn him out for anyone; that he told Mrs. Green that Root had made a good dog for her, and he should hate awfully to be in Root's boots; that there was jealousy between Mrs. Wiley and Root, and he thought there would

be some trouble before they got done; that he knew nothing about Mrs. Green's character only what Louis Lapan told him, which was, that he caught Root and Mrs. Green in intercourse together. All of the testimony of this witness was excepted to generally, and that part about what the prisoner said Lapan told him was excepted to particularly; but no ground of exception was stated in either case. It did not appear whether Lapan did thus catch Root and Mrs. Green, nor whether he ever told the prisoner that he did. There is a general statement in the bill of exceptions that the relations between Root and Mrs. Green were the subject of neighborhood talk, but it does not appear that there was any exception to that line of testimony. The prisoner's brief mentions only the exception to that part of the testimony as to what the prisoner said Lapan told him. It then states what the bill says about evidence of neighborhood talk, and submits "that this rehearsal of neighborhood talk was immaterial, and should not have been allowed," and makes no other objection. We take the objection to be to the admission of what the prisoner said Lapan told him, and to nothing else. As to this the rule is when the declarations of a party are given in evidence against him, that all he said upon the subject at the same time must be received and weighed. *Mattox* v. *Lyman,* 18 Vt. 98; *State* v. *Mahon,* 32 Vt. 241. And the reason is, because the thought as a whole, and as it actually existed, cannot be ascertained without taking the utterance as a whole, and comparing the successive elements and their mutual relations. To look at a part alone, would be to obtain a false notion of the thought. The total and real meaning can be got at only by going on to the end of the utterance. One part cannot be separated, and taken by itself, without doing injustice by producing misrepresentation. 3 Wig. Ev. § 2094, p. 2821. This is like con-

struing a written instrument, which you take by the four corners, and look at the whole and every part.

For the purpose of further showing the like motive and purpose on the part of the prisoner, Mr. Huntley was allowed to testify under exception, that he met the prisoner one day, and spoke to him about a pair of horses of the prisoner's; that in answer to his inquiry the prisoner said the Greens had all seen the horses except Mr. Green, who was then in Canada; and that the prisoner then added that he supposed Root and Mrs. Green were going to Canada on a visit when Green got back, that he had heard they were, but did not know whether they would or not. It is objected that this addition was inadmissible, and had no bearing on any issue in the case. But we think it was admissible for the purpose for which it was offered. The prisoner went out of his way to say that, which was susceptible of being thought to indicate that his mind was brooding on the relations between Root and Mrs. Green, which would strengthen the claim of the State in this respect.

A witness called by the State testified that a short time before Root was killed, he had a conversation with the prisoner in which he said in reply to a question by the witness, that if Root stayed at Green's it would be doubtful about the witness's getting his pay from Green continually. It is objected that the prisoner had a right to answer this confidential inquiry, and that the answer given in such circumstances could have no bearing on any issue in the case. But it does not appear that the inquiry was confidential, nor that the answer was objected to on that ground; and the admissibility of the answer is now questioned only because of the circumstances in which it was given. But those circumstances go only to its weight, not to its admissibility.

Elmer Martel, a witness for the State, testified to conversations with the prisoner in which, at the prisoner's solici-

tation, the witness agreed to kill Root for fifty dollars, which the prisoner agreed to pay him. He also testified in detail to two expeditions with the prisoner, undertaken for the purpose of executing the plot. . Martel's testimony was the only evidence as to conversations between him and the prisoner about the hiring and the plot, which the prisoner denied. Martel testified on this subject that Friday night, Oct. 2d, he slept with the prisoner at Frank Hubbard's, where the prisoner was staying, and that an arrangement was then made between them at the prisoner's solicitation that they would go across Brandon mountain the next day; that the prisoner should borrow Hubbard's rifle, and take it to some place on the mountain road above the Green mill, and there deliver it to the witness, who should take it and go across the mountain just behind the prisoner and his team, for the purpose of shooting Root if he should meet him on that road, as it was expected, from the prisoner's knowledge of Root's movements, that he would at the time of day the trip was to be made; that if the prisoner met Root, he should turn and follow him back towards the witness, and if the prisoner heard a gun, he should go at once to the witness,and they would go together to the house of one Crapo in Goshen, the prisoner assuring the witness that they could prove by Crapo that they had been at his house together all night; that pursuant to this arrangement the witness went the next day by a roundabout way to the meeting place agreed upon on the mountain road, and there waited in the bushes beside the road between the house of Bruno Green and that of Mrs. Mary Derby; that the prisoner came past where the witness was waiting, got out of his wagon, and placed Hubbard's rifle and some cartridges on the ground at the place agreed upon, got back into his wagon, and drove along up the mountain; that the witness then took the rifle and the cartridges, and went up the mountain afoot behind the prisoner,

and crossed the mountain, and met Root near the top on the Brandon side, and that then W. F. Huntington was there in the road near by with his team; that the witness stopped and talked with Huntington, and while talking with him, fired the rifle in the air, and then hurried on towards Brandon afoot, leaving the rifle in the ditch beside the road.

The State introduced the testimony of many witnesses, to corroborate Martel's story, to which the prisoner excepted, for that the testimony was not corroborative of his story; that the circumstances thereof were not material nor in issue, and not such as a corroboration could be predicated upon.

Before this line of testimony was introduced, Crapo and wife had testified without objection about the prisoner's being at their house in Goshen on the Brandon side of the mountain near the top, and about his having gone out with a lantern, claiming to have lost a blanket, and about seeing him again when going to church the next day, Sunday, after he had left their house to go towards Brandon, returning from that direction on the road to Rochester. The first of these many witnesses was one Severy, by whom the State offered to show that he was at work on the mountain road the 3d of October, and saw the prisoner and the Martel boy there. Thereupon the prisoner admitted that he stayed at Crapo's over night, and went out with a lighted lantern, and that he understood that Martel went over the mountain at the time he testified he did.

It appeared that the prisoner procured a revolver from his brother in Springfield, Mass.; and there was evidence that he had Hubbard's rifle and said revolver in his possession when staying at Hubbard's, and that the rifle and the revolver were in Martel's possession at places away from Hubbard's after the prisoner borrowed the rifle. The State's evidence tended to show that Martel procured the revolver from the prisoner at Hubbard's on Friday night, October 2d, and that he re-

turned to Hubbard's on Sunday, October 4th, and left the revolver and the rifle there.

No claim was made that either the rifle or the revolver was used in killing Root; but Martel's testimony tended to show that when he had the rifle and the revolver in his possession, the prisoner had reason to believe that he might use the rifle to shoot Root according to the plot; but there was no evidence that he attempted it.

It is objected that if Martel's testimony had any tendency to connect him or the prisoner with Root, it was, in effect, that pursuant to an agreement with the prisoner, Martel undertook to kill Root by shooting him, and started upon that expedition, but failed in his purpose; that though it may be claimed to have a tendency to show that the prisoner intended to make way with Root, it cannot be claimed to have any tendency to show that Root's death was the result of a plot on the part of the prisoner to murder him with Martel's assistance. It is contended that inasmuch as Martel neither had, nor is claimed to have had, any part in killing Root, it was enough for the State, if its purpose was to show a murderous intent on the part of the prisoner, to introduce evidence of the plot, and that it was unlawful to prejudice the prisoner by evidence of Martel's attempt to carry out the plot, whether the abandonment was from lack of opportunity or because Martel changed his purpose; but that the State, not content with this, went further, and introduced the testimony excepted to, the real effect of which was, to show that in the afternoon of October 3d, the day in question, Martel was seen by some of the witnesses on the Brandon road on the Rochester side of the mountain, and by some on the Brandon side, sometimes with a gun, and sometimes without one.

It appeared that Green's mill was on that road on the Rochester side of the mountain, and that Bruno Green's house

was on that road next above the mill, and Mrs. Derby's house next above Bruno Green's.

Some of said witnesses testified to seeing Martel at Green's mill in the afternoon of the day in question, and in the road below Mrs. Derby's house, without a gun, and some, that he disappeared up the road, followed by the prisoner, who had a horse and carriage, and soon reappeared at Mrs. Derby's, following the prisoner, and had a gun, which other testimony tended to show was Hubbard's rifle. Some testified that the prisoner and Martel talked together at the mill. Others testified to meeting them later that afternoon when the witnesses were returning from Brandon. Some said they met them near the top of the mountain on the Rochester side; and some, that they met them near the top and at varying distances below the top, on the Brandon side, Martel always being behind the prisoner, and always carrying a gun, except below where he said he left the rifle in the ditch beside the road, he was seen without a gun.

There was testimony other than Martel's, tending to show that the prisoner and Martel slept together at Hubbard's on Friday night, October 2d, and that the prisoner rose early Saturday morning, October 3d, and left Hubbard's alone, saying he was going to Hancock; that he returned to Hubbard's during the afternoon, and inquired for Martel, and went to several houses in the vicinity in search of him; that he borrowed Hubbard's rifle Friday night, October 2d, and that the rifle was returned to Hubbard's on Sunday, October 4th, and that the prisoner's revolver was in his own possession that Friday night, and was brought to Hubbard's that Sunday with Hubbard's rifle, by Martel.

The prisoner testified that he went across the mountain Saturday, October 3d, and passed Martel between the houses of Bruno Green and Mrs. Derby, and that Martel rode with

him part of the way between those houses, and had no rifle nor gun of any kind with him on the road that day at any time when he saw him, and that he himself had no rifle that day, and had no knowledge of Martel's having one, nor any gun of any kind.

It is further objected that if the foregoing testimony, aside from Martel's, is to be regarded as circumstantial evidence from which is to be inferred the probability of the prisoner's connivance with Martel in a plot to murder Root, it is lacking in that it has no tendency to confirm Martel's statement of procuring the rifle from the prisoner; and further, that it shows that having procured the rifle, he did nothing with it except what was perfectly innocent; that unquestionably it has no tendency to prove that the prisoner committed the crime charged, namely, the murder of Root with a bludgeon by lying in wait for him at his stable door on the night of October 12th, and that it cannot be connected with the alleged design to accomplish such a crime; that the most that can be claimed for it is, that it shows an opportunity to carry out the alleged plot if in finding Root the circumstances favored its execution.

To the objection that though Martel's testimony may have tended to show that the prisoner intended to make way with Root, it did not tend to show that Root's death was the result of a plot on the part of the prisoner to murder him with Martel's assistance, and that, inasmuch as Martel had nothing to do with the murder, it was enough for the State, if its purpose was to show a murderous intent on the part of the prisoner, to introduce evidence of the plot, and that the details of Martel's attempt to execute it were inadmissible and harmful,—the answer is that though harmful they were admissible, both because they corroborated Martel's story of the plot itself, and because they so connected the prisoner

with the attempt as to make him a participant in it, and therefore tended to fix the murder upon him, the rule being that prior attempts by one to commit the crime for which he is being tried, are evidence against him. *State* v. *Ward,* 61 Vt. 153, 181, 17 Atl. 483.

To the further objection that if the foregoing testimony, other than Martel's, is to be regarded as circumstantial evidence from which is to be inferred the probability of the prisoner's conniving with Martel in a plot to murder Root, it is lacking in that it has no tendency to confirm Martel's statement of procuring the rifle from the prisoner,—the answer is that it does have such tendency, especially when taken with the testimony, other than Martel's, of the prisoner's having borrowed Hubbard's rifle Friday night, October 2d, the expedition over the mountain being the next day, when that testimony shows the prisoner and Martel at Green's mill, talking together, Martel having no gun; shows Martel going up the road from there, having no gun, but followed by the prisoner with a horse and carriage; shows him between Bruno Green's and Mrs. Derby's, having no gun; but when he gets to Mrs. Derby's he has a gun, and the prisoner is ahead of him instead of behind him as before; and the testimony tended to show that the gun he had was Hubbard's rifle that the prisoner borrowed the night before.

The further objection that the testimony has no tendency to show that the prisoner committed the murder with a bludgeon, as charged, and cannot be connected with the alleged intent to commit such a murder,—is not tenable; for an intent to murder in some way, and an attempt to murder in a particular way, are evidence of a murder in another way.

One Mattison testified that he was at work on Brandon mountain that fall, and one day about the middle of the afternoon, a young man came along with a rifle, which he took and

looked at and handed back to the young man, who went on up the mountain road. The witness could not say whether it was Martel or not. On being shown the Hubbard rifle, the witness said it seemed to him as if it looked like the gun. It is specially objected that this testimony was immaterial and prejudicial. But we think it material as tending to show that Martel was the young man, and as tending to show that it was the afternoon of the day of the expedition over the mountain. The witness's identification of the gun shown him as the one the young man had, though not very positive, was sufficiently so to be admissible, as he gained his impression by actual observation, and in that identification lies the tendency of the testimony indicated.

A witness testified to meeting a stranger near Goshen Corners between half past six and seven o'clock Saturday evening, October 3d, the day of the expedition, and of noticing that he was quite short and walking rapidly towards Brandon. Another testified to meeting a man a little earlier that evening between Crapo's and the Corners, with an unlighted lantern. It is objected that this testimony was too conjectural; that it might or might not have been the prisoner, as to which the jury was at liberty to guess. But we think, taken with the other testimony as to that expedition, it fairly tended to show that it was the prisoner.

The testimony of Lenora Washburn, objected to for the same reason, was entirely unimportant and clearly harmless, and pointed to no time here involved, nor to any other particular time.

The State introduced the testimony of several witnesses in corroboration of Martel's testimony about recrossing the mountain on Sunday, October 4th, the next day after said expedition, drawing his buggy, taking the rifle from the ditch beside the road where he left it the day before, and having a

pistol with him. It is objected that this testimony had no tendency to show complicity between Martel and the prisoner, nor to connect the prisoner with it, and therefore was improperly admitted.

We recognize the rule invoked, that you cannot prove a crime by proving another and a disconnected crime. But if this testimony is to be regarded as tending to show the crime of attempting to commit the crime charged, the rule does not apply, for the attempt is not a separate and disconnected crime, but, as we have seen, is so connected with the crime charged as to be admissible to prove it.

The cases relied upon to show that this testimony was not legally corroborative, are to the effect that to constitute such corroboration of an accomplice as will make it safe for a jury to convict on his testimony, the evidence must tend to confirm his testimony upon a point material to the issue in the sense that it tends to prove the guilt of the prisoner. But they recognize that you may support an accomplice by evidence short of that, the same as you may support any other witness. And this was done in *Commonwealth* v. *Bosworth,* 22 Pick. 397, as explained in *Commonwealth* v. *Holmes,* 127 Mass. 424. *Brown* v. *Welch,* 38 Vt. 241, is illustration of this kind of corroboration. In the case at bar the State did not rely for conviction wholly on the testimony of Martel.

The prisoner having introduced evidence tending to show that Martel was influenced by threats of imprisonment to tell the story he did, it was competent for the State to show that he made similar statements before the alleged threats, about the prisoner's having hired him to kill Root. *State* v. *Flint,* 60 Vt. 304, 14 Atl. 178. Nothing is suggested in argument to distinguish this case from that on this point.

The objection for immateriality to Hubbard's testimony that he saw the prisoner's repeating rifle and revolver when

they were found in the hay in his barn, is not well taken, for the testimony was supportive of evidence admitted without objection and not claimed to have been irrelevant.

It appeared that Root received his death blows in the evening at his horse barn near John Green's house. Peter Green, son of John Green, testified that he saw a man that evening looking in at their kitchen window who he thought was the prisoner, but would not swear positively. The State offered to show an experiment made in the night when there was snow on the ground, with everything arranged in the kitchen as nearly as possible the same as when the witness said he saw the man's face, the result of which was confirmatory of the witness's testimony. The offer was excluded on objection, but the ground of exclusion does not appear. Later in the trial, the prisoner introduced evidence of an experiment the evening of the homicide, when Peter went out and stood by the window, and his mother and brother looked out to see if they could tell him. She said she sat in the same place Peter did, and looked out of the window, and was then asked if she looked "to see if she could tell who it was out there," and answered, "No, sir: I saw some one there, but could not see who it was." Thereupon the State renewed the offer of its experiment, to which the prisoner objected that if any evidence made it admissible it came from Mrs. Green in answer to a question that did not call for it, and that no evidence had been introduced tending to show similarity of conditions outside the house as to light there and other surroundings, nor what the conditions were outside, any further than Mr. Fellows stated. The objection was overruled and the testimony admitted. It does not appear what Mr. Fellows stated. It is contended that the experiment was not illustrative of the condition of the subject-matter at issue in the controversy; that the point made by the prisoner was, that Peter's

unwillingness to swear that it was the prisoner, was because he was not himself perfectly satisfied that it was; that if others might be able under somewhat similar conditions to say positively, it would have no tendency to show that Peter ought to have been able to swear more positively, nor to show that his confidence in what he said ought to have been greater than he testified; that the question was not one of expert testimony, nor directed to proof of any physical conditions that might affect the possibility of seeing; that it was for the jury to weigh the testimony of the witness as his; and that it was not competent to show that other witnesses, if they had been there, might have seen with such clearness as to swear positively whom they saw; and cases are cited in support of the contention.

The State contends that the original transaction was not of such a nature as to render it legally incapable of being the subject of experiment, and that if its essential conditions were reproduced, which must be assumed, the contrary not appearing, the experiment and its result were admissible on principle. But if not, that the prisoner opened the door, and made the testimony admissible as rebutting evidence. And this is manifestly the view the trial court took of the matter, and we think correctly; for it does not appear that the prisoner, in the time of it, disavowed the irresponsive part of Mrs. Green's answer, from which it would seem that he was letting it stand for what it was worth, and the court might well regard the door open for rebuttal.

Although it was not claimed that Martel killed Root, yet he was under such a cloud that it was material for the State to guard against such a claim by showing that he was where he could not have killed him; for every reasonable hypothesis except that of the guilt of the prisoner had to be excluded, and

it would have been legitimate to argue that Martel might have killed him.

The State claimed that Root was killed by blows upon the head with a stake of an old hayrack that the prisoner took from Hubbard's, which, in his flight back to Hubbard's he threw into the bushes beside the road, where it was afterwards found. A piece had been split from the stake when found, and a splinter, found the next morning after the homicide near where it was committed, exactly fitted the stake, thus demonstrating that it was split from the stake. Hubbard testified that he once had an old-fashioned hayrack with bedpieces, raves, and stakes, and described how the raves were held up by the stakes.

Another stake was introduced in evidence, numbered 21, concerning which another witness testified that in November, 1903, he saw under Hubbard's carriage shed the raves of an old hayrack with holes bored through them, evidently to set down onto stakes; that he measured the holes the Sunday before he testified, and last saw stake 21 at Hubbard's that day. To the admission of the testimony of this witness, and the introduction of said stake in evidence, the prisoner excepted. The prisoner introduced evidence of the finding of other stakes, at other places in the vicinity, but it did not appear whether those stakes were similar or dissimilar to the one found beside the road.

In support of said exception it is argued that there was no evidence to connect the prisoner with stake 21, nor to show that he had any knowledge of its existence, and consequently that both it and the testimony concerning it were inadmissible. But the question is not whether the evidence connected the prisoner with that stake, nor whether he knew of its existence, but whether that stake connected the prisoner with

the other stake by tending to show that it came from Hubbard's; and that it did thus tend, is not questioned.

The prisoner claimed, and his evidence tended to show, that Root's death was accidental. At the close of the charge, his counsel suggested that it did not sufficiently explain that in considering whether the death was accidental or not, the prisoner was not obliged to show how it might have happened, but if from evidence of facts that existed, or were shown by the evidence to exist, the jury should be satisfied in their own judgment, regardless of the prisoner's theories, that there was a reasonable doubt whether it was accidental or not, the prisoner was entitled to acquittal. The court said it thought it had exactly covered that point, and refused to charge further, and the prisoner excepted to what was not complied with in accordance with the suggestion.

It is contended that the charge was erroneous in that it limited the jury to a consideration of the matter solely as presented by the arguments of counsel based upon the evidence, whereas the suggestion ought to have been complied with; that the charge expressly put the question thus: "If you consider that the theory of an accidental death cannot reasonably be entertained upon this evidence," whereas it should have been, and if the charge had been qualified as suggested, would have been, put thus: "If upon this evidence you are satisfied that there is no reasonable doubt that the death was not accidental but the work of design."

But if the charge is to be regarded as limiting the jury as claimed, no error appears, for it does not appear but that counsel presented the matter in every view warranted by the evidence. But we do not think the charge, when taken as a whole, did limit the jury as claimed, but left them to an independent consideration of the matter upon the evidence, and that they must have so understood it.

The objection to the way the question was put to the jury is based upon part of a sentence taken from the charge, which, when taken with the rest of the sentence, and with the rest of the short paragraph of which it is a part, is substantially what it is claimed it ought to have been. The paragraph is this: "If you fail to find that Root's death was due to human agency, that will end the case in favor of the prisoner. But if you consider that the theory of accidental death cannot reasonably be entertained on this evidence, there remains the question whether the prisoner inflicted the injuries." The court had already instructed the jury as to the burden of proof resting on the State, and the necessity of establishing the offence beyond a reasonable doubt, and told them that the evidence being entirely circumstantial, it must be such as to exclude every reasonable theory consistent with the prisoner's innocence; that that was but another statement of the rule that the offence must be established beyond a reasonable doubt, for if there remained a reasonable ground on which the killing could be accounted for without the agency of the prisoner, it could not be said that his guilt was established beyond a reasonable doubt.

Judgment that there is no error in the proceedings of the county court; that the respondent take nothing by his exceptions; and that execution of the judgment and sentence be done.

JULIUS O. FROST *v.* THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY OF LONDON AND EDINBURGH.

October Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 18, 1905.

Fire Insurance—Foreign Corporation—Authority of United States Branch—Officers—Policy—Power of Agents—Proof of Loss—Waiver—Right to Sue—Question for Jury.

The powers of an agent are, *prima facie*, co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.

In an action on a fire insurance policy issued by a company incorporated under the laws of a foreign country, evidence examined, and *held*, as matter of law, to show that the actions and doings of the managers at the general office of the company's United States branch pertaining to the policy and the loss in question were the acts and doings of the company itself.

Held also that the evidence showed that a general agent in whose hands the adjustment of the loss was placed, in respect of the adjustment, was clothed with all the powers of the company and acted in its stead.

The provision of the "Standard Fire Insurance Policy" of New York that the policy shall be void, unless otherwise provided by agreement indorsed thereon or added thereto, in case of other insurance, increase of hazard, incumbrance, vacancy, etc., does not apply to a waiver of proofs of loss.

The stipulation of a fire insurance policy negativing authority in any officer or representative of the insurer to waive the requirement for furnishing proofs of loss within 60 days after the fire is for the benefit of the insurer, and can be waived by it.

Such stipulation does not preclude the insured from showing that the representative of the insurer having in charge the adjustment of the loss was authorized by the insurer to make such a waiver.

Notwithstanding such stipulation, the acts and declarations of an agent who was appointed by the insurer with unlimited authority to adjust a loss, respecting the subject matter he had in hand are admissible in an action on the policy to show a waiver of proofs of loss.

A distinct denial of liability by the insurer and refusal to pay upon a specific ground, unconnected with the proof of loss, before the time has expired within which the insured is bound by the terms of the policy to present formal proof of loss, is a waiver of proof of loss, entitling the insured to maintain an action on the policy at once.

The waiver of such proof of loss is a waiver of the condition that no action can be maintained on the policy, and no loss is payable under it, till a time limited after satisfactory proof of loss has been received by the insurer.

When an agreement has been reduced to writing, not under seal, it is competent for the parties by subsequent oral agreement to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or to vary or qualify any of the terms of it.

A provision in a policy of fire insurance that in any matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of the insurer, is for the benefit of, and subject to waiver by, the insurer.

In an action on a policy of fire insurance, evidence examined, and *held* that whether the local agents, who countersigned the policy and through whom the insurance was made, were treated by the parties, in what they did relative to the loss, as agents of the defendant was a question for the jury.

ASSUMPSIT on a policy of fire insurance. Pleas, the general issue and four special pleas in bar. Trial by jury at the April Term, 1903, Windsor County, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

Clarke C. Fitts for the defendant.

Norton did not have authority to waive the provision in the policy requiring proof of loss. *Smith* v. *Ins. Co.*, 60 Vt. 690; *Powers* v. *Ins. Co.*, 68 Vt. 394.

E. L. Waterman, J. L. Martin and *E. W. Gibson* for the plaintiff.

The company is bound by the knowledge its agents have of the facts affecting the risk. *Keenan* v. *Mo. State Ins. Co.*, 12 Ia. 126; *Westchester Fire Ins. Co.* v. *Earle*, 33 Mich. 143; *Earle F. Ins. Co.* v. *Globe L. & T. Co.*, 44 Neb. 380; *Phoenix Ins. Co.* v. *Stocks*, 149 Ill. 319; Am. & Eng. Enc. Vol. 16, 914, 915; *Tarbell* v. *Vt. Mut. Fire Ins. Co.*, 63 Vt. 53; *Ring* v. *W. C. Mut. Fire Ins. Co.*, 51 Vt. 563.

The insurer can waive the provision that a waiver must be in writing. Harrison v. Ins. Co., 67 Fed. Rep. 577; *Dibbrell* v. *Ins. Co.*, 110 N. C. 193; 67 Miss. 620; 65 Miss. 301.

Whatever a foreign insurance company can lawfully do at its home office can be done by the agent representing it at the place where the contract is made relative to the business of which he is superintendent. *Goldwater* v. *Liverpool & L. & G. Ins. Co.*, 12 Cent. Rep. 51 (N. Y.); *Union Mut. Life Ins. Co.* v. *Wilkinson*, 13, Wall. 222; *Peckner* v. *Phoenix Ins. Co.*, 65 N. Y. 195; *Walsh* v. *Hartford Fire Ins. Co.*, 73 N. Y. 5; *Kuney* v. *Amazon Ins. Co.*, 36 Hun. 66; *Carrigan* v. *Ins. Co.*, 53 Vt. 418.

A refusal to pay on the ground that there is no liability is a waiver of proof of loss. *Knickerbocker Life Ins. Co.* v. *Pendleton*, 112 U. S. 696 S. C. 115 U. S. 339; *Home Ins. Co. of N. Y., Appt.* v. *Charles Koeb et al.*, 53 L. R. A. Book 56; *German Ins. Co.* v. *Frederick*, 58 Fed. Rep. 142; *Russell* v. *Ins. Co.*, 36 Fed. Rep. 443; *Lazensky* v. *Knights of Honor*, 31 Fed. Rep. 592; *Steamship Co.* v. *Hall*, 55 Fed. Rep. 663.

WATSON, J. This action is general and special assumpsit upon an insurance policy to recover amount of loss by fire. The defendant pleaded the general issue and four special pleas in bar. The fourth special plea is that the plaintiff did not within sixty days after the fire, render a proof of loss to the defendant, signed and sworn to by the plaintiff, as required by the terms of the policy. In reply thereto, the plaintiff says in short that such proof was waived by the defendant.

The policy contains provisions that within sixty days after the fire, unless such time is extended in writing by the company, the insured shall render to the company a proof of loss, signed and sworn to by him; and that the loss shall not become payable until sixty days after satisfactory proof of the loss required in the policy has been received by the company.

At the close of the evidence the defendant moved for a verdict upon sixteen grounds assigned therefor, and excepted to the overruling of the same. It is argued that the motion should have been granted upon the last seven grounds assigned, the substance of which may be stated thus: that by the undisputed evidence, the plaintiff did not within sixty days after the fire render a proof of loss to the company, signed and sworn to by him as required; that there was no evidence tending to show any waiver of such proof on the part of the company; that there was no written waiver thereof attached to the policy or indorsed thereon, and none introduced in evidence; that the time for filing such proof of loss has never been extended in writing by the company, nor waived, nor extended, nor forborne by it, or any representative, agent, or officer thereof; and that by the terms of the policy, no action can be maintained upon it and no loss is payable under it until sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss has been received by the company in accordance with the terms of the policy.

From the policy itself and other evidence in the case, it appears that the defendant is a foreign company of London and Edinburgh, established under the laws of the Kingdom of Great Britain and Ireland; that the company has a United Stated Branch with its general office in the city of New York. As is contended by the defendant, the case shows no correspondence or negotiations with the home office of the company regarding the loss, hence it is important to inquire regarding the powers of the officers, agents and representatives in charge of this general office in New York. It appears that the United States Branch has in New York a board of directors, a manager, an assistant manager, and a general adjuster; that the manager is the general manager of the company in the United States, in charge of the office in New York, and the general adjuster is in charge of the loss department, and that all proofs of loss received by the company at that office are in his charge and custody. And the evidence tended to show that general agents were appointed by the authorities at that office for the company in other states of the union, also local agents who are authorized and empowered to receive proposals for insurance and to make insurance by policies of the company signed by one of its said directors and attested by the manager; and that for all purposes of making insurance contracts, issuing policies, receiving moneys on such contracts, adjusting and paying losses, in the United States, those in charge of the general office in the city of New York were intrusted with unlimited powers without control or interference by the managers of the home office in London or Edinburgh. The policy to the plaintiff was issued for the company by one of its directors and its manager at the general office in New York, acting under power of attorney from the company, countersigned by the local agents at Brattleboro through whom the insurance was made. With such facts es-

tablished, it would follow, as a matter of law, that the actions and doings of the managers at the general office of the United States Branch pertaining to the policy or the loss in question must be considered as the acts and doings of the company itself. *Hartford Ins. Co.* v. *Haas,* 87 Ky. 531; *Hartford Life, etc. Ins. Co.* v. *Hayden's Admr.* 90 Ky. 39; *Rivara* v. *Queen's Ins. Co.* 62 Miss. 729; *Phoenix Ins. Co.* v. *Bowdre,* 67 Miss. 620, 19 Am. St. Rep. 326. The rule recognized and quoted in *Smith* v. *Niagara Ins. Co.* 60 Vt. 682, 15 Atl. 353, "that the powers of an agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals" is much in point here.

The house covered by the policy was burned October 9, 1901. The platintiff who has an office in Boston immediately by letter notified Taylor and Son, the defendant's local agents in Brattleboro, that the house was burned. On receipt of this letter, Taylor and Son notified the company at the New York office of the loss, and so stated in their letter to the plaintiff written October 11, in reply to his letter of the 9th. The campany, by its assistant manager at the New York office, notified Ralph S. Norton, the general agent of the company residing in Maine, of the loss. Norton was the company's adjuster and was the sole person having in hand the work of the settlement of losses in the states of Maine, New Hampshire and Vermont. On October 14, the company put the matter of the plaintiff's loss entirely into Norton's hands to do with as his judgment might dictate, and thereafter he represented and acted for the company in connection therewith. Thus in this matter Norton was clothed with all the powers of the company and acted in its stead. Therein he was made the company's special agent with unlimited authority. This appears not only from the undisputed testimony of Norton,

but also from a letter written by the general manager to the plaintiff dated December 20, saying, "We have been fully advised both by our Brattleboro agents as well as our adjuster, Mr. Norton, regarding this loss, and we have hoped that a speedy and satisfactory understanding would be arrived at. Mr. Norton is thoroughly competent and fair-minded and there should be no difficulty in reaching an understanding with him. The matter is entirely in his hands to do with as his judgment may dictate, and whatever you two agree upon will be approved by this office;" and by a letter from the general manager to the plaintiff's attorneys, dated December 28, in which he says "the matter was placed in the hands of our special agent, R. S. Norton of Portland, Me., to whom we will refer your letter."

The defendant contends that even though it could be said that Norton's acts and declarations constitute a waiver of the proof of loss, it cannot avail the plaintiff, since the policy provides that there can be no waiver by any officer, agent, or representative of the company, unless it be written upon or attached to the policy. In support of this contention we are referred to the case of *Smith* v. *Niagara Ins. Co.* before referred to. There the policy contained a provision that no officer, agent, or representative of the company should be held to have waived any of the conditions of the policy unless such waiver was indorsed on the policy. One Turner was a general agent of the company, having supervision of all its affairs and its adjuster of losses within and for the New England States. It was held that if not an officer he was a representative of the company, and came within that restriction in the policy, which was valid and binding on the parties.

But we think the case at bar is distinguishable from that case in this regard consequent on the material difference between the limitations in the policies. The policy under con-

sideration is what is known as the "Standard Fire Insurance Policy" of New York and several other states, the last paragraph of which reads: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such powers or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

By the terms of the policy certain things render it void unless otherwise provided by agreement indorsed on the policy or added thereto. Thus, the having or subsequently procuring other insurance on the same property; the increase of hazard by any means within the control or knowledge of the insured; if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; if a building described in the policy, whether intended for occupancy by the owner or by a tenant, be or become vacant or unoccupied and so remain for ten days,—these and many other things named in the policy may be subjects of agreement of waiver so indorsed or added. Under the provisions of the paragraph aboved quoted the power of an officer, agent or other representative of the company to waive any of the provisions or conditions of the policy is limited to such as are so made subject of agreement, and then the power does not exist unless the waiver shall be written upon or attached to the policy.

By the same paragraph, all other provisions and conditions of the policy, are without the power of any officer, agent, or other representative to waive in any manner, whether in writing or otherwise. The waiver of proof of loss is not specified in the former class, hence,—unlike the Smith case,—it is not within the provision requiring a waiver by an officer, agent, or representative to be written upon or attached to the policy. *Quinlan* v. *Providence Washington Ins. Co.* 133 N. Y. 356; *Dwelling-House Ins. Co.* v. *Snyder,* 59 N. J. L. 18, 34 Atl. 931.

The stipulations negativing authority in any officer, agent, or other representative to waive any provision or condition in the latter class are made however for the benefit of the company and can be waived by it. *Powers* v. *New England Fire Ins. Co.* 68 Vt. 390, 35 Atl. 331; *Findeisen* v. *Metropole Fire Ins. Co.* 57 Vt. 520. And they do not preclude the insured from showing as a fact that the officer, agent, or representative having in charge the adjustment of the loss was invested with the same power, in other words, that the restrictions upon him in this respect had been removed. This fact proved, such adjuster would have all the authority of the company in the settlement of the loss, including the waiver of the specified provisions relating thereto, notwithstanding the limitations contained in the policy. *Smith* v. *Niagara Fire Ins. Co.* is authority on this point. It was there held that the general agent and adjuster, unless restricted in his authority, the insured having notice thereof, had all the power of the company, in the settlement of a loss, to waive any of the conditions of the policy.

In *Knickerbocker Life Ins. Co.* v. *Norton,* 96 U. S. 234, 24 L. ed. 689, the Court, speaking through Mr. Justice BRADLEY, said the policy "also contained an express declaration that the agents of the company were not authorized to make, alter

or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing." This holding was referred to with approval by the same Court in a recent case where it was further said that an agent can be given such power, and whether it has been given or not may be shown by parol. *Iowa Life Ins. Co.* v. *Lewis,* 187 U. S. 335, 47 L. ed. 204. See also *Little* v. *Phoenix Ins. Co.* 123 Mass. 380, 25 Am. Rep. 96; *Hartford Fire Ins. Co.* v. *Keating,* 86 Md. 130, 63 Am. St. Rep. 499; *Messelback* v. *Norman,* 122 N. Y. 578; *Bishop* v. *Agricultural Ins. Co.* 130 N. Y. 488.

It follows that Norton's acts and declarations in the course of the performance of his duties as such special agent, respecting the subject-matter he had in hand, stand like the acts and declarations of any other agent when acting within the scope of his authority, and were proper evidence to be considered on the question of waiver. *Brink & Co.* v. *Merchants' etc. Ins. Co.* 49 Vt. 442.

This evidence together with other evidence in the case tended to show a waiver of the preliminary proof, and the waiver of such proof is a waiver of the condition that no action can be maintained upon the policy and no loss is payable under it till a limited time after satisfactory proof of loss has been received by the company. In such case suit may be brought at once upon the denial of liability, although the time limited by the policy after proof may not have expired. *Norwich & N. Y. Trans. Co.* v. *Western Mass. Ins. Co.* 34 Conn. 561; *Williamsburg Ins. Co.* v. *Cary,* 83 Ill. 453. In overruling the motion for a verdict there was therefore no error.

The defendant submitted twelve different requests to charge, but here relies on its exception to the non-compliance with the eighth, ninth, and twelfth only. Of these the eighth and ninth were based upon some of the same provisions of the policy as was the motion for a verdict, as above considered, and they were properly refused.

The exception to the charge regarding the waiver of proof of loss that the jury were entitled to treat whatever was done, said, or written by the adjuster as done, said or written by the company itself, is without force and has also in effect been disposed of. Nor was there error in the charge that to amount to a waiver of such proof the jury must find that there was either an express agreement between the parties to that effect or that there was such a course of conduct on the part of the defendant as was reasonably calculated to throw the plaintiff off his guard and lead him to believe that the company did not require it. That such preliminary proofs may be dispensed with by express agreement there can be no doubt upon elementary principles of written contracts not under seal; for when the agreement has been reduced to writing it is competent for the parties by subsequent oral agree-

ment to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify any of the terms of it. *Flanders* v. *Fay,* 40 Vt. 316. No question is made touching the consideration necessary to support such an agreement. There may also be an implied waiver which may be inferred from the circumstances, as when the conduct of the insurers is such as to induce delay or to render the production or correction of the proof useless or unavailing, by a distinct denial of liability and refusal to pay upon a specific substantive ground unconnected with the proof of loss, before the time had expired within which the insured was bound by the terms of the policy to present formal proofs,—*Noyes* v. *Washington County Mut. Ins. Co.* 30 Vt. 659; *Walsh's Admx.* v. *Vermont Mut. Fire Ins. Co.* 54 Vt. 351; *Mosley* v. *Vermont Mut. Fire Ins. Co.* 55 Vt. 142,—or to induce in the mind of the insured a belief that no proofs will be required, or that those already furnished, though defective, are satisfactory and therefore sufficient. 2 May on Ins. § 468-469. In *Findeisen* v. *Metropole Fire Ins. Co.* before cited, this last rule was applied.

The defendant's twelfth request was "That in all matters relative to this loss and its adjustment, Taylor & Son had no authority to act for and bind the company, but were in whatever they did about it the agents of plaintiff."

Taylor & Son were defendants' local agents at Brattleboro. The morning after the fire the plaintiff sent them a letter saying "I just got word the yellow house, so called, was burned last night. I think there is a small insurance on it in some company you represent. I do not know the particulars. It was occupied at the time." The body of the letter contained nothing more. Thereupon Taylor & Son notified the company, and then replied to the plaintiff as follows: "We are in receipt of yours of the 9th and hasten to reply. We

have notified the company on the risk, the North British & Mercantile, and as soon as we hear from them will let you know when they will be here to adjust the matter. Trusting this meets with your approval, we beg to remain," etc. On receipt of such notice from Taylor & Son, the company immediately put the matter into the hands of Norton as special agent. As time went along other letters were written by the plaintiff to Taylor & Son making inquiries regarding the settlement of the loss, and Taylor & Son communicated either directly or indirectly with the general manager who wrote the plaintiff on December 20, "we are in receipt of your letter of the 18th with reference to the loss recently sustained by you in Brattleboro, Vt. We have been fully advised both by our Brattleboro agents as well as our adjuster, Mr. Norton, regarding this loss, and we have hoped that a speedy and satisfactory understanding would be arrived at," etc., and on December 28th, the general manager wrote the plaintiff's attorneys "This claim was brought to our attention in due course by our Brattleboro agents, H. E. Taylor & Son." While it is doubtless true that under their commission Taylor & Son were not the agents of the company in matters pertaining to the settlement of losses,—*Smith* v. *Niagara Ins. Co.* already cited,—yet there was no reason why the company might not make them its agents in those matters in any particular case. Nor does the clause in the policy that in any matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of the company, require a different holding; for this clause, if it has any application to matters wholly subsequent to the loss,—a question which we do not consider,—was made for the company's benefit and is subject to its waiver. *Findeisen* v. *Metropole Fire Ins. Co.*

Upon the evidence appearing of record, it cannot be said as a matter of law that the parties did not by their actions

treat Taylor & Son in what they did relative to the loss and its adjustment, as the agents of the company. In the circumstances if material it was a question for the jury, and in ignoring the twelfth request there was no error.

This disposes of all the points made in the defendant's brief, and *judgment is affirmed.*

A. C. BLANCHARD, ET AL. *v.* CITY OF BARRE.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 18, 1905.

Municipal Corporations—Charter Provisions—Street Paving Assessments — Session Proceedings — Jurisdictional Facts—Judicial Determination by City Council—Delegation of Power—Cloud on Title—Bill to Remove—Equitable Jurisdiction—Constitutional Questions—When Considered.

The power of a city to make a street paving assessment exists only when distinctly conferred by legislative authority, and where the mode of exercising the power is prescribed it must be followed, and the assessment must affirmatively show on its face that it was made according to the prescribed rule.

Nothing will be presumed in aid of the regularity of session proceedings. The facts necessary to give jurisdiction must affirmatively appear.

The charter of the city of Barre gives the city council power to order the street commissioners to drain, pave or macadamize a street, when the council, by resolution, "decide that the public good and

the convenience and necessity of individuals demand" the contemplated improvement to be made. *Held*, that a resolution passed by the council reciting that "Whereas it seems desirable" that a certain portion of a street should be paved, and directing the street commissioners to "issue notice to abutting owners, hold hearings, hear the claims of those interested, and if, in their judgment, the public good and convenience and necessity of individuals demand it, to have said portion" of the street so paved, was not a determination by the council of the necessity and expediency of the proposed improvement.

The city council had no jurisdiction unless they found that the public good and the convenience and necessity of individuals demanded the contemplated improvement to be made, and the determination of that essential jurisdictional fact is judicial in character and cannot be delegated.

Hence the determination by the street commissioners, pursuant to such attempted delegated power, that the public good and convenience and necessity of individuals demanded the street to be paved, was void, and an assessment made thereunder invalid.

The charter of the city of Barre provides that when a paving assessment has been recorded in the city clerk's office the amount assessed shall be and remain a lien in the nature of a tax on the property assessed until the same is paid. The bill alleged that said invalid assessment against the orator's lands had so become a lien theron, and was a cloud on the title, and prayed for the removal thereof. *Held*, that, as the assessment proceeding constituting the alleged cloud was void on its face and no extrinsic evidence was required to show its invalidity, there was no cloud to remove, and a court of equity would not interfere.

A bill to enjoin the collection of a paving assessment and to remove the cloud consequent thereon from the orator's title, alleging that the assessment was invalid because made according to frontage and not "according to special benefits" to the land assessed, as required by the city charter, showed that the assessment proceeding was void on its face for non-compliance with the mode prescribed. *Held*, that, no fraud being alleged, orator had an adequate remedy at law.

Courts will not pass upon the constitutionality of a statute, unless it it necessary to do so in order to finally determine the case.

APPEAL IN CHANCERY. Heard on demurrer to the bill of complaint at the March Term, 1904, Washington County, *Tyler,* Chancellor. Demurrer overruled, *pro forma,* bill adjudged sufficient and taken as confessed. The defendant appealed. The opinion fully states the case.

Richard A. Hoar, and *Senter & Senter* for the orators.

The paving assessment cannot legally be made unless the owners of the property to be assessed are notified and given the opportunity to be heard by the city council as to the necessity of the proposed improvement. *Stearns* v. *Barre,* 73 Vt. 281; *Foster* v. *Bank,* 57 Vt. 132; *Snow* v. *Sandgate,* 66 Vt. 451.

The charter is unconstitutional in that it does not provide that the parties interested shall be heard on the question of benefits to the land assessed. *Falbrook Irg. Dist.* v. *Bradley,* 164 U. S. 174; *Spencer* v. *Merchant,* 125 U. S. 345, *Walstun* v. *Levin,* 128 U. S. 578.

The power vested in the city council to decide that the public good and the necessity of individuals demand the proposed improvement to be made is judicial in character and cannot be delegated. *Henry* v. *Chester,* 15 Vt. 460; *Bolton* v. *Gilleran,* 105 Gal. 244, 45 Am. St. Rep. 33; *Workmen* v. *Chicago,* 61 Ill. 463; *Smith* v. *Duncan,* 77 Ind. 92; *Hydes* v. *Joyes,* 4 Bush. (Ky.) 464; *Baltimore* v. *Scarf,* 54 Md. 499; *Scofield* v. *Lansing,* 17 Mich. 437; *Minneapolis Gas Light Co.* v. *Minneapolis,* 36 Minn. 159; *Thompson* v. *Boonville,* 61 Mo. 282; *State* v. *Trenton,* 42 N. J. L. 74; Matter of Emigrant Industrial Sav. Bank, 75 N. Y. 393; *McCrowell* v. *City of Bristol,* (Va.) 43 Am. & Eng. Corp. Cas. 149.

Gordon & Jackson for the defendant.

The necessity and expediency of paving the street is not a question on which the abuttors have a right to an appeal. The Legislature had a right to delegate the decision of this question to the city council or to any other tribunal. Cooley on Taxation, 2 Ed. p. 653-4, 656 and 657; *Ludlow* v. *Trustee,* 78 Ky. 357; *Moore* v. *People,* 106 Ill. 376; *County of Henipen* v. *Bartlesson,* 37 Minn. 343; Matter of D'Peyster, 80 N. Y. 565; Washington Ave., 69 Pa. St. 352; 8 Am. St. Rep. 255; *Fairbanks* v. *Mayor et al.,* 13 Mass. 42; *City of Fort Wayne* v. *Cody,* 43 Ind. 197; *Ricketts* v. *Spraker,* 77 Ind. 371; *Anderson* v. *Baker,* 98 Ind. 587; *Thomas* v. *Gain,* 98 Ind. 587; *Kelley* v. *Minneapolis,* 57 Minn. 294, 47 Am. St. Rep. 605, 610; *Allen* v. *Drew,* 44 Vt. 174; *State* v. *Fuller,* 34 N. J. L. 227; Cooley on Taxation, 2 Ed. 623-4; *People Ex. Rel. John Davidson et al. v. Gilon et al.,* 126 N. Y. 147 to 157.

The ordinance of the city council directing the street commissioners to pave the street settles the question that the necessity and expediency contemplated by the charter had arisen. *Young* v. *St. Louis et al.,* 47 Mo. 492, 494; *People* v. *Bowen,* 21 N. Y. 517; *Kiley* v. *Forsee,* 57 Mo. 390, 394-5; *Bohles' Admr.* v. *Stannard,* 7 Mo. App. 51, 54-5; *Serbert* v. *Tiffany* 8 Mo. App. 33, 37; *Waln* v. *Philadelphia,* 99 Pa. St., 330-337.

WATSON, J. The orators seek an injunction perpetually restraining the defendant from taking and selling the orators' land or any part thereof to satisfy certain assessments made thereon for paving a portion of Main street, and from taking any further steps to collect said assessments, and to remove the cloud consequent on the same from the orators' title. The case is here on demurrer to the bill, hence all matters well pleaded stand admitted.

By the defendant's charter,—Laws of 1894, No. 165 as amended by laws of 1902, No. 211,—the administration of all fiscal, prudential, and municipal affairs of the city and the government thereof is vested in the mayor and board of aldermen. The board of aldermen consists of six members, one of whom is elected president of the board. The mayor and board of aldermen, when assembled in joint session, constitute and are the city council. At all meetings of the city council, the mayor is to preside, except that in case of his absence, or disability, the president of the board of aldermen shall preside.

Section 13 of the charter provides for a standing committee of the board of aldermen on streets and highways to consist of three members of the board, and that the members of such standing committee shall constitute the board of street commissioners. By this section also, "Whenever a petition in writing shall be presented to the city council, signed by the owner or owners of two-thirds of the frontage upon any street, lane or alley in said city, or of any portion of such street, lane or alley, particularly describing such street, lane or alley, or portion thereof, and praying that the same may be drained, graded, paved or macadamized, curbed and guttered, or that any of such improvements may be made, or when the city council, by resolution duly passed, shall decide that the public good, and the convenience and necessity of individuals demand that any street, lane or alley, or any portion thereof, should be drained, graded, paved or macadamized, curbed and guttered, or that any of said improvements shall be made, the city council shall forthwith order and direct the street commissioners to cause such street, lane or alley, or such portion thereof, as shall be specified in such petition or resolution of said city council to be drained, graded, paved or macadamized, and curbed and guttered, as

the case may be. And the street commissioners, on giving twelve days' notice of the time and place of hearing to the parties interested, in the manner provided in section 3296 of the Vermont Statutes, shall assess not to exceed one-half the total cost and expense thereof upon all the lots and buildings fronting upon or adjacent to the street, lane or alley, or part thereof, specified and described in such petition, or specified in said resolution, to be drained, graded, paved or macadamized, curbed and guttered, as aforesaid, according to the special benefits to such lands or buildings upon such street, lane or alley, or portion thereof, according to frontage. And said street commissioners shall make up a statement of all such assessments, particularly describing the lands or buildings assessed, and such statement they shall forthwith cause to be recorded in the city clerk's office, and when so recorded, the amount so assessed shall be and remain a lien, in the nature of a tax, upon the lands or buildings assessed, until the same shall be paid, when said lien shall be discharged by the city clerk. It shall be the duty of the city clerk to place such lists of assessments in the hands of the city treasurer for collection, as soon after he shall have recorded the same as may be. The city treasurer shall thereupon forthwith notify in writing the owner or owners of lands or buildings so assessed, their agents or attorneys, stating therein the amount of such assessments, and all such assessments shall be paid to the city treasurer within sixty days after such notice, unless," etc.

It is alleged that the city council never decided, nor was there any judgment, decree, or finding, by it, that the public good, convenience and necessity of individuals demanded the said street, or portion thereof, should be drained, paved, curbed and guttered on a concrete foundation; but that on the 10th day of June, 1903, without any petition therefor from

the abutting land owners fronting said street, and without notice or hearing, or right to be heard by the orators, the following resolution was passed by the city council, and signed by the president of the board of aldermen:

"Resolved by the city council of the city of Barre, now in session, as follows,—that, whereas, it seems desirable that Main street, from its intersection with Prospect street to the National Bank of Barre, should be paved with granite blocks: Therefore, be it resolved that the street commissioners be and are hereby instructed to issue notice to abutting owners, hold hearings, hear the claims of those interested, and if, in their judgment, the public good and convenience and necessity of individuals demand it, to have said portion of Main street so paved, in accordance with the provisions of the city charter and city ordinances."

That this resolution purports to have been adopted June 10th, 1903, and approved on the same day by the mayor; that the city council, by resolution, did not order and direct the street commissioners to cause said street, or such portion thereof as is specified in said resolution, to be drained, graded, curbed and guttered, or to place in said highway concrete foundation for said pavements; that the street commissioners on the 24th day of June, 1903, without authority in law, held a meeting to ascertain whether or not the public good, and the convenience and necessity of individuals demanded that said street, or a portion thereof, should be drained, graded, paved and guttered, and that said commissioners thereafter adjudged that the public good, and the convenience and necessity of individuals did demand that the portion of Main street, between Prospect street and the National Bank, should be paved with granite blocks on a concrete foundation, and that the abutting land owners, on said street, should be assessed for the same according to the provisions of the city charter

and ordinances; that said alleged finding was dated the 26th day of June, 1903, and signed by the street commissioners; that the street commissioners, in accordance with the provisions of said finding, and not otherwise, caused North Main street, from the center of Prospect street northerly past the land and premises of the orators, to be drained, graded, paved with granite blocks, curbed and guttered, on a concrete foundation, in accordance with certain plans and specifications prepared by the city engineer, under the direction of the street commissioners.

It is further alleged that on the 2nd day of November, 1903, after the work had been completed, the street commissioners assessed the orator Blanchard's lands and buildings on the frontage, in the aggregate $335.75, and the land and premises of the orator Averill, on the frontage, in the aggregate $211.21; that the street commissioners have made up a statement of these assessments and caused the same to be recorded in the city clerk's office, and that said assessments, so recorded, have become a lien in the nature of a tax upon the lands and buildings of the orators, and have become, by virtue of the record and the city charter, an incumbrance upon the property of the orator Blanchard for the sum of $335.75, and upon the property of the orator Averill to the amount of $211.21; and that the city clerk has placed said list and assessments in the hands of the city treasurer for collection, and has notified the orators that unless the same shall be paid forthwith, the city treasurer will issue a warrant to the constable of the city for collection.

Under the provisions of the charter, the city council have jurisdiction to order and direct the street commissioners to cause a street, lane or alley, or any portion thereof, to be drained, paved or macadamized, curbed and guttered only, (1) "When a petition in writing shall be presented to the

city council signed by the owner or owners of two-thirds of the frontage upon such street, lane or alley, or any portion thereof, and praying that the same may be drained, graded, paved or macadamized, curbed and guttered, or that any of such improvements may be made," or (2) "When the city council, by resolution duly passed, shall decide that the public good, and the convenience and necessity of individuals demand the contemplated improvement to be made." *Kent* v. *Village of Enosburgh Falls*, 71 Vt., 255, 44 Atl. 343.

The existence of either of these jurisdictional facts is negatived by the allegations in the bill. It is urged, however, that the resolution adopted by the city council June 10th, 1903, is in effect a direct finding by that body that, in its judgment, the public good and convenience and necessity of individuals require the street to be paved. But we do not think it is fairly subject to such construction; for, after stating "that whereas it seems desirable" that a certain portion of Main Street should be paved, it then expressly instructs the street commissioners "to issue notice to the abutting owners, hold hearings, hear the claims of those interested, and if, in their judgment, the public good and convenience and necessity of individuals demand it, to have said portion" of the street so paved, etc., in language too plain in meaning to admit of doubt. This reference of the question excludes the idea that it had been determined by the city council, or that it was so understood by them.

The determination of the jurisdictional fact thus attempted to be referred is judicial in character,—*Stearns* v. *City of Barre*, 73 Vt., 281, 50 Atl. 1086,—and it cannot be delegated, the maxim of the law being *delegatus non potest delegare*. An individual clothed with judicial functions cannot delegate the discharge of those functions to another, unless he is expressly empowered to do so under specified circumstances. For the

ordinary rule is, that although a ministerial officer may appoint a deputy, a judicial officer cannot. Broome's Leg. Max. (8th Ed.) 840; *Walsh* v. *Southworth,* 6 Exch., 150; *Baker* v. *Cave,* 1 H. & N., 674; 3 Kent's Com. *457. Consequently, the acts of the street commissioners, pursuant to such attempted delegated power in determining that the public good, and the convenience and necessity of individuals, demanded that a portion of Main street be paved, were without authority in law and void. It follows that the paving of the street and the assessment of a portion of the expense thereof on the orators' lands and buildings were unauthorized and invalid.

It is further contended by the defendant that on the case made out by the bill, the orators have adequate remedy at law, and there is no ground for relief in equity. By the provisions of the city charter, an assessment made upon lands or buildings, as a portion of the expense of paving a street, etc., shall be recorded in the city clerk's office, and when so recorded, the amount so assessed shall be and remain a lien, in the nature of a tax, upon the lands or buildings assessed, until the same shall be paid. The bill alleges that the assessment against the orators' lands and buildings has so become a lien thereon, and is a cloud on the title, to remove which a court of equity has jurisdiction.

The question is thus presented, whether the so-called lien is a cloud upon the title. If it is, there can be no doubt regarding equity jurisdiction; but if it is not, the orators cannot stand upon this ground for equitable relief.

These are session proceedings concerning the regularity of which nothing is presumed. The facts necessary to give jurisdiction must affirmatively appear. *Kent* v. *Village of Enosburgh Falls,* before cited. Since these facts are wanting the proceeding constituting the alleged cloud is void on its

face, so that no extrinsic evidence is necessary to show its invalidity. In these circumstances there is no cloud to remove, and a court of equity will not interfere, but leave the party to his remedy at law. 3 Pom. Eq. Jur. § 1399; *Rooney* v. *Soule,* 45 Vt. 303. This rule was applied in its converse form and equitable relief granted in *Hyser* v. *Mansfield, 72* Vt. 71, 47 Atl. 105.

The charter provides that an assessment shall be made "according to special benefits to such lands or buildings upon such street, lane or alley, or portion thereof, according to the frontage." The bill alleges that the assessment was made according to frontage without reference to special benefit of the different properties, and the amount that each owner of land fronting said street was specially benefitted according to frontage. It further alleges that some of the property is very much more improved by way of buildings erected thereon than the orators' and that some of the lots are deeper than the orators', and that some lots contained two or three times the number of square feet contained in the land of the respective orators.

The power to make such assessments exists only when distinctly conferred by legislative authority, and where the mode of exercising the power is prescribed, it must be followed. And the assessment must affirmatively show, on its face, that it was made according to the rule prescribed; for the law regards it as of the substance of the proceedings, and we cannot treat it as immaterial, nor can presumption supply its place. *Merritt, et al* v. *Village of Portchester,* 71 N. Y., 309; *Liebermann* v. *City of Milwaukee,* 89 Wis., 336; *Hayes* v. *Douglas,* 92 Wis., 429; *State, New Brunswick Rubber Co.* v. *Commissioners of Streets and Sewers,* 38 N. J. L., 190; *Nichols* v. *City of Bridgeport,* 23 Conn., 189, 60 Am. Dec., 636.

It follows that in the absence of fraud—and none is alleged in the bill—any illegality of the tax consequent on a non-compliance with the law in the mode of assessment must, as in the case of a failure to find an essential jurisdictional fact, necessarily appear on the face of the proceedings, and the orators have an adequate remedy at law.

The orators contend that the law under which the assessments were made deprives the land owners of their property without due process of law, and is therefore unconstitutional. But we have not considered this question, since it is a generally recognized rule that courts will not pass upon the constitutionality of a statute unless it is necessary to the final determination of the case.

The pro forma decree is reversed, and cause remanded with mandate that the demurrer be sustained, the bill adjudged insufficient and dismissed with costs.

KENNEDY McGRATH *v.* ALANSON D. WILDER.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and POWERS, JJ.

Opinion filed May 18, 1905.

Replevin—Measure of Defendant's Damages—Use of Thing Replevied—Increased Value.

In an action of replevin for a heifer wherein the defendant prevails, he is entitled to recover the value of the use of the heifer during the period of her detention under the writ, without deduction for her increase in value during that time.

REPLEVIN for a heifer. Heard on the report of a referee at the September Term, 1904, Franklin County, *Haselton*, J., presiding. The referee found that the heifer in question was the property of the defendant; that during the period of her detention the heifer dropped a calf which the plaintiff killed, and which was worth $1.00; that the value of the heifer's milk during the period of her detention by plaintiff, less the cost of her care and keeping during that time, was $6.00; that when the heifer was replevied she was worth $20.00, and when returned to the defendant she was worth $25.00.

The court held, as matter of law, that the measure of defandant's damages was the value of the use of the heifer during the period of her detention by the plaintiff, without deduction for her increase in value during that time, and rendered judgment for the defendant to recover $7.00 damages, and costs. Said damages consisting of said $6.00 and said $1.00. The plaintiff excepted.

Farrington & Post for the defendant.

C. G. Austin & Sons for the plaintiff.

START, J. The action is replevin for a heifer. The only question reserved for consideration in this Court, is whether in determining the defendant's damages the increase in the value of the heifer during the detention should have been deducted from the value of her use.

If the heifer had been in the possession of the defendant during the time she was detained upon the replevin writ, he would have had the benefit of her increase in value, and in addition to this, he would have had the use of her. By the replevin he has been deprived of this use, and the value of this use, in so far as appears, represents his actual damage for the

taking and detention, and he is entitled to this sum without any reduction for her increase in value. Am. and Eng. Ency. of Law 2nd. Ed. 522, 523; *Allen* v. *Fox,* 51 N. Y. 562; 10 Am. Rep. 641; *Washington Ice Co.,* v. *Webster,* 68 Maine 449; 16 Am. Rep. 462; *Nash* v. *Larson,* 80 Minn. 458; 81 Am. St. 272; *Yandle* v. *Kingsbury,* 17 Kan. 195; 22 Am. Rep. 282.

Judgment affirmed.

JULIUS W. RUSSELL'S EXECUTRIX *v.* CLARENCE J. FERGUSON.

October Term, 1904.

Present: ROWELL, C. J., TYLER, START, WATSON, and POWERS, JJ.

Opinion filed May 18, 1905.

Attorneys—Liability for Costs — Evidence—Custom and Usage.

An attorney is not, by virtue of that relation alone, liable for fees accruing in suits brought by him.

Attorneys may by custom become responsible for fees in suits brought by them, if the custom is of the requisite character.

But a custom, in order to change the rights and liabilities of persons *prima facie* arising from their dealings with each other, must be certain, uniform, and either known to the party sought to be charged thereby, or so general and notorious that knowledge and adoption thereof may be presumed.

The law as to the measure of proof of such custom is somewhat exacting, and before the question can be submitted to the jury, evidence must be produced which, when fairly and reasonably considered, would establish a custom of the requisite character.

Evidence considered and *held* insufficient to justify the jury in finding a custom by which attorneys entering a case in a city court became personally liable to the judge for accruing court fees.

GENERAL ASSUMPSIT. Pleas, the general issue, payment, Statute of Limitation, and tender. Trial by jury at the March Term, 1904, Chittenden County, *Munson,* J., presiding. Verdict ordered for the defendant, and judgment thereon. The plaintiff excepted. The opinion states the case.

Powell & Powell for the plaintiff.

Custom may render an attorney personally liable on contracts made by him for his client. 12 Cyc. 1073; *Wires* v. *Briggs,* 5 Vt. 102; *Doughty* v. *Paige,* 48 Ia. 483.

Brown & Taft, and *V. A. Bullard* for the defendant.

In the absence of a special contract, attorneys are not liable for fees in their clients' cases. *Sargent* v. *Pettibone,* 1 Aikens 355; *Briggs* v. *Wires,* 5 Vt. 101; *Christmas* v. *Russell,* 2 Metc. (Ky.) 112; *How* v. *Cadman,* 4 Me. 82; *Moore* v. *Porter,* 13 S. & R. (Pa.) 100.

Even a universal custom will not establish an implied contract, unless it appears that defendant knew of the custom. *Mayberry* v. *Mansfield,* 58 E. C. L. 754.

POWERS, J. The plaintiff seeks by this action to recover certain court fees alleged to be due from the defendant on cases entered by him as attorney for others in the City Court of Burlington while the late Judge Russell was judge of that court. At the close of the plaintiff's evidence, the defendant moved for a verdict. This motion was overruled and the case submitted to the jury. Later, the jury having reported without agreement, the motion was granted, a verdict for the de-

fendant was ordered and returned, and the plaintiff excepted. So the only question for us to consider is whether on the evidence as it stood, without regard to its admissibility, this verdict should have been ordered.

There was no evidence in the case that the defendant, who, in the cases on which these fees accrued, was the mere agent of his clients, was under any special engagement with Judge Russell to pay them. Whatever the rule may be in other jurisdictions, it has long been the settled law of this State that an attorney is not, by virtue of that relation alone, liable for fees accruing in suits brought by him. *Wires* v. *Briggs,* 5 Vt. 101. But attorneys may by custom become responsible for fees of this kind, if the custom is of the requisite character, for it is simply the case of an agent becoming personally liable on contracts made for his principal. 12 Cyc. 1073. And the plaintiff here relies solely for a recovery upon the custom which she says has prevailed in the city court of charging the fees to the attorney entering the case,—a custom which she says is well established, uniform, notorious and of long standing.

A custom in order to be controlling, in order to change the rights and liabilities of persons arising from their dealings with each other, must be certain, uniform, and either known to the party sought to be charged thereby, or so general and notorious that knowledge and adoption of it may be presumed. *Ball, etc., Exhibition Co.* v. *Pickett,* 22 L. R. A. 690; *Bank* v. *Grafflin,* 1 Am. Rep. 66; *Harper* v. *Pound,* 10 Ind. 32; *Smith* v. *Gibbs,* 44 N. H. 335; *Linsley* v. *Lovely,* 26 Vt. 123.

The law as to the measure of proof is somewhat exacting. And while the mere fact of a conflict in the testimony as to the existence of the custom or usage relied upon does not, as matter of law, negative the same, yet before the ques-

tion can be submitted to the jury, evidence must be produced which, when fairly and reasonably considered, would establish a custom of the character above specified. *Milroy* v. *Railway Co.*, 98 Ia. 188. So it is held that evidence by the plaintiff and his witnesses to the effect that they have individually assumed a custom to exist, and have acted on it, although they have not tested it nor heard of it from others, is legally insufficient to establish it. *Duling* v. *Railroad Co.*, 66 Md. 120, 6 Atl. 592. In *Linsley* v. *Lovely, supra,* though there was some evidence tending to show a custom, this Court held that the question of custom was properly charged out of the case,—the effect of the holding being, as stated in the head-note, that if such custom or usage is not fairly proved, it should be laid wholly out of the case.

An analysis of the evidence in this case discloses a failure to establish a binding custom both in character and measure of proof. The witnesses were five in number: Judge Hawkins, who was clerk of the city court during a larger part of the time that Judge Russell presided over it, and four members of the Chittenden County Bar. There were dockets and ledgers used at the trial, but they are not before us. Judge Hawkins' direct testimony tended to prove a custom on Judge Russell's part to charge fees to the plaintiff's attorney, unless an arrangement was made to the contrary at the time the case was entered. But the exceptions to this rule and the variations from it disclosed by his cross-examination and the admission of plaintiff's counsel so mar the certainty and uniformity of the custom, that his testimony taken as a whole, could not sustain a legal inference that the defendant knew of it and acquiesced in it so as to make it binding upon him.

The testimony of the other witnesses was even more unsatisfactory. One said it was the custom to charge the fees to attorneys *so far as he had any knowledge of it.* But it did

not appear that he knew anything about it except what was done in his own cases; and of these, it appeared that the fees were forgiven by Judge Russell in more instances than they were charged to him. Another testified that the fees were always charged to the attorneys *as he understood it.* But the basis of his understanding did not appear, except what might arise from his own relations with the city court, in which he brought four suits for others during the six years Judge Russell presided over it. The third attorney testified in effect that there was a custom and practice in the city court of charging court fees to the plaintiff's attorney, but that it was not universal, and was subject to a great many exceptions, and that he, himself, was never asked to pay court fees unless he had collected them of his client. The fourth attorney testified that he did not know about the custom except in his own cases; that he always paid his fees in advance from money collected from his clients and that he didn't know that fees were being charged to him.

There was not enough in this evidence to make out a custom so well established and uniformly acquiesced in, that the jury could be fairly justified in inferring that it was known to the defendant, and that it entered into his mind, and made, by implication, a part of his engagement in his dealings with the city court.

Judgment affirmed.

ANNIE FOGARTY *v.* RUTLAND STREET RAILWAY COMPANY.

October Term, 1904.

Present: ROWELL, C. J., MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 18, 1905.

Street Railroads—Negligence—Plaintiff Bound by Theory of Declaration—Inconsistent Requests to Charge.

In an action for injuries to a passenger when alighting from defendant's street car, plaintiff's declaration and evidence showed that after the car had come to a full stop for plaintiff to alight it was suddenly started as she was about to step off, whereby she was thrown to the ground and injured, and in argument plaintiff's counsel expressly disclaimed any right to recover on any other state of facts. *Held*, that plaintiff could not complain that the court, in submitting the case to the jury, refused to charge that plaintiff might recover on any other theory than that the accident occurred after the car had come to a full stop.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1904, Rutland County, *Tyler*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

The plaintiff requested the court to charge that "if the plaintiff proceeded to the platform while the car was in motion, and then attempted to alight while the car was still moving, but going as slowly as the defendant's testimony tended to show, and the car was then started and she was thereby thrown to the ground, it was not negligence upon her part, as a matter of law, and she could recover."

The court refused to so charge to which the plaintiff excepted.

P. M. Meldon and *M. C. Webber* for the plaintiff.

Butler & Moloney for the defendant.

The plaintiff cannot try and argue her case on a certain theory and complain because the court does not submit the case to the jury upon a different theory. *Hamblet* v. *Bliss,* 55 Vt. 533; *O'Connor* v. *Sowles,* 57 Vt. 470; *Hawkins* v. *Ins. Co.,* 57 Vt. 591; *Rollins* v. *Chambers,* 51 Vt. 592; *Richardson* v. *Concord,* 40 Vt. 207.

POWERS, J. The plaintiff seeks damages for injuries received while she was alighting from the defendant's trolley car. By her declaration she charges that after the car had come to a full stop for her to alight, it was suddenly and carelessly started, and that thereby she was thrown to the ground and injured. This was the case made by her evidence, and in argument her counsel not only put the claim of recovery upon this ground, but expressly disclaimed any right of recovery on any other ground or state of facts.

In these circumstances the plaintiff cannot complain that the court in submitting the case to the jury, omitted or declined to recognize and submit some other theory on which a recovery might be predicated. *Richardson* v. *Concord,* 40 Vt. 207; *Sherman* v. *Canal Co.,* 71 Vt. 325, 45 Atl. 227; *Frappiea* v. *Johnson,* 75 Vt. 397, 56 Atl. 100. So the court correctly charged the jury, in effect, that if the plaintiff had established her claim that the accident occurred after the car had come to a full stop for her to leave it she could recover; otherwise she could not. This instruction was in language so clear as to leave no room for doubt that the jury fully understood the question they were to decide.

But it is urged that in restating the question, the court said: "On the other hand, if you find that when she (plaintiff) reached the platform, the car was then in motion, we in-

struct you that she is not entitled to recover, as a matter of law, *because the law would not uphold her, in the circumstances of this case, to attempt to alight from the car while it was still in motion.*" And it is insisted that that part of the instruction here italicised, as an abstract proposition, is not sound. But of this we need not inquire. For the jury had already been correctly instructed, in entire harmony with the plaintiff's claim, that if the car was in motion when she attempted to get off, there could be no recovery. Such was the dominant idea of this instruction, and whether the reason assigned was sound or otherwise was, in view of the position the plaintiff had taken, immaterial and could not prejudice.

Nor can the exception to the court's refusal to charge on the subject of contributory negligence according to the plaintiff's request, avail her, for she had put the question of contributory negligence out of the case by the disclaimer above referred to; and although it may have contained a sound proposition of law (a question which, though argued is not decided) it was not, for the reason stated, applicable to the case on trial. *Winn* v. *Rutland,* 52 Vt. 481.

After the charge was given, the plaintiff claimed the right to recover even though the car was moving at the rate indicated by the defendant's evidence. But it was then too late. The court was under no obligation to give a new charge on a theory then for the first time adopted and utterly inconsistent with that which had obtained throughout the whole course of the trial.

Judgment affirmed.

CHARLES E. CORUTH *v.* FRANK JONES.

January Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, HASELTON, and POWERS, JJ.

Opinion filed May 18, 1905.

Trespass — Assault and Battery — Evidence — Harmless Error—Withdrawal of Evidence from the Jury.

In trespass for assault and battery, plaintiff's evidence tended to show that he had believed that improper relations existed between his wife and defendant, and that during an altercation with defendant concerning that relation the latter, without warning, struck him with a stick. The defendant admitted the altercation, but testified that he struck in self-defence. *Held*, that it was not error to permit plaintiff to show when his wife and defendant became acquainted, and that, in a former controversy between plaintiff and defendant over the latter's relations with the wife, defendant told plaintiff it was none of his business.

Plaintiff's witness having testified that after the assault defendant told witness that he struck plaintiff, and it not appearing that in so saying defendant claimed he was acting in self-defence, it was not error to permit the witness to further testify that during the same conversation defendant said he was sorry that anything like that had happened.

On cross-examination, defendant was asked whether he did not visit plaintiff's wife at a certain house, and remain there nearly all day, with the curtains down, and he replied that he did not go there to visit her, and was not there with her. *Held*, that, defendant having denied that he made the visit indicated in the question, the error, if any, in allowing the question to be answered, did not prejudice the defendant, and was harmless.

In trespass for assault and battery, evidence tending to show that by general reputation in the community where he resided and the incident occurred the defendant was a peaceable and law-abiding man is inadmissible.

In trespass for assault and battery, evidence that by reputation defendant was a peaceable and law-abiding man having been im-

properly admitted over plaintiff's objection and exception, it was not error, as against the defendant, for the court to subsequently withdraw this evidence from the jury, and to refuse to allow defendant's counsel to discuss it before them.

TRESPASS for assault and battery. Pleas, the general issue and *son assault demesne.* Trial by jury at the June Term, 1904, Caledonia County, *Watson,* J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The exceptions state that plaintiff testified, subject to defendant's objection and exception, that prior to the alleged assault he had a talk with defendant about the latter's relation with plaintiff's wife, "in which talk he asked defendant if he would not keep away and told him he was making trouble, and that defendant, in reply, said it was none of my business."

Dunnett & Slack for the defendant.

Smith & Smith for the plaintiff.

It was not error to permit plaintiff to testify when defendant became acquainted with plaintiff's wife, and that as a result of that acquaintance there was unfriendly feeling between plaintiff and defendant. This unfriendly feeling rendered it more probable that the assault occurred, and tends to show motive. *Armstrong* v. *Noble,* 55 Vt. 428; *Edwards* v. *Leavitt,* 46 Vt. 127; *Howland* v. *Day & Dean,* 56 Vt. 318; *State* v. *Emery,* 59 Vt. 84.

Evidence of defendant's character as a man of peace is inadmissible in civil actions for assault and battery. Greenleaf on Ev. Vol. 1, art. 55; Peake on Ev., 3; Sanders' Pl. & Ev., 356, 493, star paging; Century Digest, Vol. 4, art. 42, "Assault and Battery," Starkie, Vol. 2, 366.

START, J. The plaintiff's evidence tended to show that he had believed that improper relation existed between his wife and the defendant; that he had an altercation with the defendant concerning that relation and that, while so doing, the defendant without warning struck him with a stick. The defendant's evidence tended to show that he had an altercation with the plaintiff, on the occasion in question, concerning the defendant's relation with the plaintiff's wife, and that the blow was struck in self-defence. Such being the tendency of the evidence, it was not error to permit the plaintiff to show when the defendant became acquainted with the plaintiff's wife, that the defendant's relations to the plaintiff's wife had been a subject of controversy between the plaintiff and defendant, and that the defendant had told the plaintiff that it was none of his business. Bearing upon the probability of the blow having been struck by the defendant without warning and without justifiable provocation, as was claimed by the plaintiff, it was permissible to show the subject matter of the altercation which resulted in the alleged assault and battery, when the controversy began and the nature of it. *Armstrong* v. *Noble,* 55 Vt. 428.

The plaintiff called one Howland as a witness, and showed by him that sometime subsequent to the assault, he had a talk with the defendant, in which the defendant told him that he struck the plaintiff with a cane, and subject to the objection and exception of the defendant, Howland was then permitted to testify that Jones said to him on that occasion and in the same conversation that he was sorry anything like that had happened.

In this there was no error. The defendant having told Howland that he struck the plaintiff and it not appearing that in doing so, he claimed that he acted in self-defence, the fact that he expressed sorrow in that connection for what

he had done lessened the probability of the truthfulness of his claim on trial that he acted in self-defence. If he had done no wrong and had acted entirely in self-defence he would be less likely to express sorrow for what he had done than he would if he were conscious of having done wrong and of having struck the plaintiff without provocation or justification, and the expression having been made in connection with the statement that he struck the plaintiff, the evidence was admissible.

The defendant in his defence testified in chief, that in a conversation with the plaintiff about his relations with the plaintiff's wife he told the plaintiff that the stories that were being told were not true; and subject to the defendant's exception he was asked upon cross-examination if he did not visit the plaintiff's wife at the house of one Clark and remain nearly all day with the curtains down. In answer to this question he said that he did not go there to visit the plaintiff's wife and that he was not with her at that house. It is unnecessary to and we do not decide whether this was proper cross-examination.

The defendant having denied that he visited the plaintiff's wife on the occasion and under the circumstances indicated in the question, if there was error in allowing the question to be answered, the defendant could not have been prejudiced thereby and the error, if any, was harmless.

The defendant introduced evidence, subject to the plaintiff's objection and exception, tending to show that by general reputation in the community where he resided and this incident occurred, the defendant was a peacable, law-abiding man. In the closing argument for the defendant, Mr. Dunnett started to argue this feature of the case, whereupon counsel for the plaintiff objected thereto. The objection was sustained by the court and counsel was not permitted to proceed further with that line of argument, to which the defendant

seasonably excepted. In this there was no error; the evidence was inadmissible, (*Wright* v. *McKee*, 37 Vt., 161.) and the court could withdraw it from the consideration of the jury, as against the party introducing it, as it did, and refuse to allow counsel to discuss it before the jury. *Clement* v. *Skinner*, 72 Vt., 159, 47 Atl. 788.

Judgment affirmed.

In Re Frank Demarco.

May Term, 1905.

Present: Rowell, C. J., Tyler, Munson, Start, Watson, Haselton, and Powers, JJ.

Opinion filed May 31, 1905.

Criminal Law—Construction of Penal Statutes—Powers Granted by Implication—Justices of the Peace—§ 114, No. 115, Acts 1904.

Though penal statutes are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intention of the Legislature.

Every statute is understood to contain by implication, if not expressed by its terms, all such provisions as are necessary to effectuate its object, and to make effective the powers and jurisdiction which it grants; and what is implied in a statute is as much a part thereof as what is expressed.

Section 114 of the license act of 1904 provides that in all prosecutions for violations of the provisions of the act, "except for intoxication and where the respondent enters a plea of guilty," justices and municipal and city courts may cause persons charged with such violations to be apprehended and committed to prison or bound over with sufficient sureties for trial by the county court.

Held, that this section does not confer jurisdiction on a justice of the peace to bind over on a plea of guilty; and since the section confers upon justices of the peace jurisdiction to accept a plea of guilty in all prosecutions for violations of the provisions of the act, jurisdiction is thereby, by implication, conferred upon justices of the peace to act upon such pleas of guilty and to enforce the penalties of the act by judgment and sentence.

HABEAS CORPUS returnable to the Supreme Court for the County of Washington at its May Term, 1905, and heard at said term.

Elwin L. Scott and *Richard A. Hoar* for the relator.

The jurisdiction of justices of the peace will not be extended by implication, as the statutes conferring jurisdiction are strictly construed. Am. & Eng. Enc. of Law, Vol. 18, p. 17; Bishop on Criminal Procedure, Vol. 1, 3rd Ed. § 236; *State* v. *Wilson*, 74 Vt. 326; Bishop on Statutory Crimes, 3rd Ed. § 194; *State* v. *McOmber*, 6 Vt. 215; *State* v. *Summer*, 10 Vt. 587.

Clarke C. Fitts, Attorney General, and *S. H. Jackson*, State's Attorney for the State.

ROWELL, C. J. The relator was brought before a justice on a complaint for selling and furnishing intoxicating liquor contrary to law, and pleaded guilty of one first offence, and was thereupon adjudged guilty, and sentenced to the House of Correction for not more than six nor less than five months, and is now restrained of his liberty on a mittimus issued to carry said judgment and sentence into effect.

Section 114 of the license Act of 1904 provides that in all prosecutions for violations of the provisions of the act, "except for intoxication and where the respondent enters a plea of guilty," justices and municipal and city courts may

cause persons charged with such violations to be apprehended and committed to prison or bound over with sufficient sureties for trial by the county court.

Section 103 of the act gives justices and municipal and city courts concurrent jurisdiction with the county court of the offence of being found intoxicated. But their jurisdiction on a plea of guilty of other violations of the act, if any they have, is to be found in section 114.

It is claimed that that section does not confer jurisdiction to sentence and do execution, nor even to bind over, but that on a plea of guilty the respondent must be discharged and let go without day. Such a construction will not be given if there is any other reasonable construction, for the rule is that statutes are to be so construed, if possible, as to give effect to all of their clauses and provisions; and while there can be no constructive offences, and before a man can be punished his case must be plainly and unmistakably within the statute; and while penal statutes are to be strictly construed,—yet the intention of the Legislature must govern in their construction as well as in the construction of other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. And again, every statute is understood to contain by implication if it does not by its express terms, all such provisions as are necessary to effectuate its object and purpose, and to make effective the rights, powers, privileges, and jurisdiction that it grants; and what is implied in a statute is as much a part of it as what is expressed.

Applying these rules, it appearing that the Legislature conferred upon justices jurisdiction to accept pleas of guilty in all prosecutions for violations of the provisions of said act, the statute must be taken to contain by implication every provision necessary to make that jurisdiction effective; and it would not be effective without jurisdiction to act upon such

pleas by enforcing the penalties of the act, and therefore such jurisdiction must be taken to be conferred, for otherwise there would be an entire failure of justice, as it is considered that the statute does not confer jurisdiction to bind over on a plea of guilty.

Judgment that the relator is not unlawfully restrained of his liberty, and he is remanded to the custody from which he was taken.

A. G. COOLIDGE, TRUSTEE IN BANKRUPTCY, *v.* LAMSON J. AYERS.

May Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed June 2, 1905.

Bankruptcy—Trover by Trustee—Sale by Preferred Creditor—Evidence—Harmless Error — Silence Equivalent to Assertion—Motion to Set Aside Verdict—Discretion of Trial Court.

In trover by a trustee in bankruptcy for a piano the transfer of which by the bankrupt to defendant's vendor thereof constituted a preference, but which defendant claimed to have purchased in good faith, for valuable consideration, and without notice, taking from his vendor a sealed bill of sale which defendant put in evidence, and which contained the covenant that the vendor would "warrant and defend the title" against all claims, it was not error to allow defendant, on cross-examination, to answer the questions whether he expected that his vendor would "make him good" in case the suit went against him, and whether he did not consider

his vendor "good for his expenses in and about this litigation" and for any judgment that might be rendered against him therein.

"Security" is something which makes the enjoyment or enforcement of a right more secure or certain.

The defendant having testified, on cross-examination, that the piano in question was a three hundred and fifty dollar piano, and that he purchased it for two hundred dollars, the further question whether one hundred and fifty dollars was quite an object, when he got "security" against any trouble about the title, is not subject to the criticism that it wrongly assumes that defendant had received security, for his vendor's covenant to him to warrant and defend the title is such "security."

The answer of a witness that he did not know, could not remember whether he made any such expression *held* to show that the error, if any, in allowing the question to be answered was harmless.

The failure by a party to assert a fact, when it would have been natural to assert it, amounts to an assertion of the non-existence of the fact.

No foundation need be laid for the impeachment of a party to a suit.

As bearing upon the question whether the transfer by the bankrupt to defendant's vendor constituted a preference under the bankruptcy law, it was proper to allow plaintiff to testify that the approximate amount of property which came into his hands as trustee in bankruptcy was $1,600.

Evidence considered and *held* to present a question for the jury in respect of whether the defendant purchased the piano in question in good faith and without notice.

A motion to set aside a verdict as being against the weight of evidence is addressed to the discretion of the trial court, and its action thereon is not revisable.

TROVER for a piano. Plea, the general issue. Trial by jury at the September Term, 1904, Rutland County, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. This case has been once before in the Supreme Court. See 76 Vt. 405.

Sometime in the fall of 1899, Marvin McClure, the bankrupt, caused a McPhail piano belonging to McClure to be placed in the house of defendant Ayers in Windsor. This piano was not sold to defendant, but was placed in his home

for trial in the hope of effecting a sale to him. It appeared that a statement regarding the ownership of the piano was made to Ayers at that time, and what he understood, or ought to have understood about it, in the circumstances, was included in the questions submitted to the jury.

In March, 1900, the McPhail Piano Company, to which McClure was then largely indebted, requested him to turn out to it divers pianos in the possession of various persons, of which the piano in question was one, in payment of the debt of McClure to said company, and McClure refused to do so. The McPhail Piano Company thereupon informed McClure that it should take the pianos and apply the proceeds thereof on said debt, to which McClure replied that he had no objection, but that he would do nothing—the company must take their chances.

In June, 1900, the McPhail Piano Company sent its agent, one Mack, to Windsor, and he there had an interview with defendant, in which Mack represented to defendant that the McPhail Piano Company was the owner of the piano in question, and McClure bought the piano from the McPhail Company for $200, taking from the company a sealed bill of sale of the piano in which was the covenant to defend the title which is recited in the opinion.

Prior to December, 1900, the McPhail Piano Company took possession of a number of other pianos placed by McClure. It was not claimed that this was by virtue of any previous transfer or permission. In December, 1900, with knowledge of such taking, McClure executed to the McPhail Piano Company a written release, under seal, of all claims and demands against it. In January, 1901, McClure was adjudged a bankrupt, and in the following May the plaintiff was appointed trustee of the bankrupt estate.

The plaintiff claimed that defendant was liable in this action because he knew, or had reason to know that the piano in question was the property of McClure when he bought the same, June, 1900. This was denied by the defendant, who claimed that he acted in good faith, and bought the piano for a valuable consideration, without knowing or having reason to know that it was not the property of the McPhail Piano Company.

C. H. Stebbins, J. C. Enright and *E. R. Buck* for the defendant.

Butler & Moloney for the plaintiff.

WATSON, J. The contract of sale under seal containing a warranty of title from the McPhail Piano Company to the defendant was introduced in evidence by the defendant. The defendant's testimony on cross-examination tended to show that the company was defending the suit. In connection with this testimony the plaintiff was permitted to ask defendant, subject to objection and exception, whether he expected that the company would make him good in case the suit went against him. Also whether he did not consider the company good for his expenses in and about this litigation, and for any judgment that might be rendered against him therein. Each of these questions was answered in the affirmative. This was not error. Since the contract of purchase introduced in connection with the defendant's testimony in chief contained a covenant that the company would "warrant and defend the title" against all claims, it was proper cross-examination to show the defendant's understanding of his relation to the case under the contract as between him and the company. This testimony when taken with the other evidence showing defendant's conduct touching the matter since the commence-

ment of this suit had a bearing on the question whether he took the property in good faith, which was declared to be a material question when this case was previously before this Court. 76 Vt. 405, 57 Atl. 970.

The defendant testified in cross-examination that it was a three hundred and fifty dollar piano and that he got it for two hundred dollars. He was then asked, subject to exception, whether one hundred and fifty dollars was quite an object, when he got security against any trouble about the title. It is argued that this question assumed that defendant had received security, a fact which had not been shown by evidence, by reason whereof it was improper in substance.

One definition of the word *security* is, that it is something which makes the enjoyment or enforcement of a right more secure or certain. Rapalje & Law, Law Dict. Thus defined, we think the covenant to the defendant to warrant and defend the title is security to him, and that the question is not subject to the criticism made.

McClure, the bankrupt and a witness called by the plaintiff, was recalled by the defendant for the purpose of laying a foundation for impeachment. For this purpose his attention was called to his testimony given at the former trial of this case, in which it appeared that the witness, in an interview with a representative of the McPhail Piano Company in December, 1900, on being informed that the company had taken the pianos, sold them, and applied the same on his account, said he was pleased to learn that fact. In further examination by plaintiff's counsel, the witness testified that he meant that he was pleased to learn there might be a balance which would be payable to him from the sale of the pianos, and not that he was pleased to learn that they had taken them. In continuation of this examination the witness was asked, subject to exception, whether he ever gave the com-

pany to understand that it was gratifying to him to have them take the pianos. He answered that he didn't know; couldn't remember whether he made any such expression to them or not. Assuming the question to be objectionable, the exception is without avail, for the answer was harmless.

The defendant gave testimony in his own behalf. In relating what was said and done between himself and the agent of the company at the time he purchased the piano, he stated among other things that the agent told him that the McPhail company had always owned the piano. In rebuttal the plaintiff was permitted to show that at the former trial in giving his testimony concerning the same occasion, the defendant did not testify that the agent so told him. The defendant excepted on the ground that he had not been asked regarding his former testimony by way of laying a foundation for such impeachment. It is a general principle of evidence that a failure by a party to assert a fact when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. Wigmore, Ev. § 1042. Unlike the case of a mere witness, in seeking to impeach a party by showing such self-contradiction, no foundation therefor need be laid. Wigmore, Ev. § 1051.

The plaintiff testified in rebuttal, under exception, that the approximate amount of property which came to his hands as trustee in bankruptcy was $1,600. This evidence was material on the question of whether the transfer by McClure to the McPhail Piano Company constituted a preference under the bankruptcy law, and it was within the discretion of the court to admit it then even though not strictly in rebuttal.

At the close of the evidence the defendant moved for a verdict on the ground that there was not sufficient evidence to warrant a verdict for the plaintiff, and to the overruling of the motion defendant excepted. It is said in the defendant's

brief that the only question for the jury was whether the defendant was an innocent purchaser for value. We do not understand that any question was made but that he paid a valuable consideration. Hence, from the defendant's point of view the material question for the jury was whether the defendant took the property under his purchase in good faith and without notice. Bearing upon this question with more or less force as evidence were many facts and circumstances with inferences to be drawn therefrom, concerning which reasonable men might differ. It was therefore a question for the jury, and the motion for a verdict was properly overruled. *Tracy* v. *Grand Trunk R'y Co.* 76 Vt. 313, 57 Atl. 104.

The overruling of the motion to set aside the verdict as being against the evidence was discretionary with the trial court and not revisable here. *Jangraw* v. *Mee,* 75 Vt. 211, 54 Atl. 189.

Judgment affirmed.

MARY M. ROGERS *v.* STATE OF VERMONT.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed June 2, 1905.

New Trial—Newly Discovered Evidence—Accomplice—Evidence—Opinions—Experts and Non-Experts—Medical Books—Criminal Law—Insanity—Hereditary Insanity.

On a petition for a new trial, in behalf of a respondent who had been convicted of murder, based on newly discovered evidence, it ap-

peared that the State called as a witness a confessed accomplice who, after having been fully advised by the court concerning his rights and privileges, testified to all the details of the homicide and to the part which he and respondent had taken in it; that though, on cross-examination, he made contradictory statements and did not answer some questions, his testimony in chief was not materially changed or shaken, and in many of its material respects was so corroborated by other witnesses and circumstances as to render it certain beyond a reasonable doubt that he had told substantially the truth. *Held*, that the court is not warranted in saying that the statement of said accomplice to certain affiants that in his said testimony "he lied and had to do it to save his neck" referred to anything besides said contradictory statements.

The evidence given at the trial, which tended to show that the cause of the death of deceased was suffocation by means of chloroform, considered, and *held*, that the newly discovered evidence revealed by the affidavit of an undertaker who testified that, on preparing the body for burial, he found "a compound multiple depressed fracture of the skull" of the deceased is not of sufficient force to create any doubt in the minds of a jury as to the cause of death.

It is essential to the admissibility of the opinion of a non-expert witness as to sanity or insanity that he first state the observations he has made upon which he bases his opinion.

The opinions of experts are not to be received in evidence unless based upon facts testified to by themselves or by others.

Standing alone and unconnected with other actions and peculiarities, the facts that a girl, while attending school, was mentally weak, of a very nervous disposition and excitable temperament, and was the butt of ridicule of her schoolmates on account of her peculiarities in dress and adornment, have no tendency to show insanity. At most, these facts only show her to be more disposed to insanity than persons in general.

Evidence of hereditary insanity is cumulative evidence only, and not admissible until a foundation has been laid by the introduction of evidence of insanity in the person whose mental condition is in issue.

Statements from medical books on insanity are not evidence; for they are made without the sanction of an oath, and by persons not present and not liable to cross-examination.

To avoid responsibility for a criminal act on the ground of insanity it is not enough that the mind is so impaired that it is incapable of distinguishing right from wrong. The mind must be so over-

come that it has no power to resist the insane impulse to commit the deed.

On a petition for a new trial in behalf of a respondent convicted of murder, based upon newly discovered evidence of, among other things, her insanity, all the evidence examined and *held*, that there is no reasonable doubt that the petitioner at the time of the homicide had the mental ability to distinguish right from wrong, to fully comprehend the nature of the act she was about to commit, and that she had sufficient will power to enable her to refrain from committing the crime.

PETITION for a new trial brought, under V. S. 1997 and 1998, by a respondent after her conviction of murder, to the Supreme Court for Bennington County, at its May Term, 1905, and heard at said term.

Thomas W. Moloney and *Senter & Senter* for the petitioner.

Where the conviction of a defendant rests largely upon the evidence of one witness who afterwards admits that he perjured himself at the trial, and tells an entirely different story concerning the transaction, yet implicating the respondent and giving a different version of his connection with it, on a proper showing it is sufficient cause for a new trial. Such evidence is more than cumulative or impeaching. *Dennis* v. *State,* 103 Ind. 142; 7 Crim. Law Mag., 172; *Fletcher* v. *People,* 117 Ill. 184; *Casey* v. *State,* 8 Crim. Law Mag., 612; *Peagram* v. *King,* 11 Am. Dec. 793.

Newly discovered evidence, although impeaching, if it shows that the respondent was convicted upon false testimony, is good ground for a new trial. This ought to be more especially true in a case involving a human life. *State* v. *Murray,* (Mo.) 3 S. W. 400; *Lincicum* v. *State,* (Tex.) 25 Am. St. R. 729; *Chatfield* v. *Lathrop,* 6 Pick. 415; *Bailey* v. *State,*

(Neb.) 55 N. W. 241; *State* v. *Moberly,* (Mo.) 26 S. W. 366; *Bowman* v. *State,* (Ga.) 22 S. W. 275.

Clarke C. Fitts, Attorney General, and *William R. Daley,* State's Attorney for the State.

Evidence of hereditary insanity in the ancestors of a person accused of a crime is not sufficient to relieve of criminal responsibility in the absence of actual insanity in the accused. *State* v. *Windsor,* 5 Harr. (Del.) 512; *Baxter* v. *Abbott,* 7 Gray 71; *People* v. *Garbutt,* 17 Mich. 9; *Walsh* v. *People,* 88 N. Y. 458; *State* v. *Hoyt,* 47 Conn. 518; *People* v. *Pine,* 2 Barb. 566; *Bradley* v. *State,* 31 Ind. 492; *State* v. *Felter,* 25 Iowa 67; Lawson on Insanity, 864.

If the petitioner had sufficient mental capacity to distinguish between right and wrong at the time of committing the act, she is responsible. *People* v. *Hurtado,* 63 Cal. 288; *State* v. *Nixon,* 32 Kan. 205; *Guissom* v. *State,* 62 Miss. 167; *State* v. *Harrison,* 36 W. Va. 729; *U. S.* v. *Ridgeway,* 31 Fed. Rep. 144; *State* v. *Lawrence,* 57 Me. 574; *People* v. *Taylor,* 138 N. Y. 398; *Flanagan* v. *People,* 52 N. Y. 467; *Casey* v. *People,* 31 Hun. 158; *People* v. *Carpenter,* 102 N. Y. 238; *DeJametti* v. *Com.,* 75 Va. 876.

WATSON, J. The petitioner, Mary M. Rogers, seeks a new trial on the ground of newly discovered evidence.

At the June term, 1903, of Bennington County Court she was indicted for murder, charged with the killing of her husband, Marcus Rogers, at Bennington on August 12, 1902. At the December term, 1903, she was tried and convicted of murder in the first degree. Judgment was rendered on the verdict, and sentence was imposed according to law.

At the trial Leon Perham of Bennington, a confessed accomplice, was called as a witness by the State and, after being

advised fully by the court concerning his rightss and privileges under the law as to giving evidence which would tend to incriminate himself and that if he gave such evidence it might be used against him in any trial he might have growing out of the matter, gave testimony in substance that he was 19 years of age and first became acquainted with the petitioner when she came to the house of his parents to room and board about two years before the time of the trial; that Marcus Rogers came there when the petitioner was rooming and boarding there, which was the first time the witness ever saw him; that about a week before the homicide the petitioner spoke to the witness saying that she wanted him to "hire a rig and go to Hoosick Corners" with her to make a date, that "this fellow has a life insurance of $1,000," and she wanted to get rid of him to get the insurance money; that she wanted to make a date with him to be on such a night beside the river, and she said to the witness, "get him beside the river" and "you drop off, you drive off in the road," and that she would "do the rest"; that she then said she was going to knock him in the head and further said, "after I roll him off into the river you drive back,"—that she would let the witness know,—and she would jump into the wagon and they would whip up the horse, "and get out of the place and get back"; that nothing came of this; that in the afternoon of the day of the homicide, the witness saw Marcus Rogers and the petitioner and one Estella Bates at the house in Bennington where the latter lived; that the witness remained there until half past five o'clock and then went to his home, Marcus and the petitioner coming down behind him, and after the witness got home the petitioner came, it being then about half past six o'clock; that the witness went to bed that night at half past eight and the petitioner about nine; that the witness laid down on the bed and went to sleep and was awakened about

half past nine by the petitioner who asked him "are you ready to go," to which the witness answered, "yes," the petitioner said, "you wake up and get ready," the witness said "all right," but did not get up immediately. About half past ten the petitioner called him again to get up and put on his clothes and upon the witness's saying "all right" she went out of the room and sat down and went to writing; that the witness's bed room and the petitioner's bed room adjoined, and to go to the witness's room it was necessary to pass through the petitioner's room; that as the witness was getting ready to go out the petitioner called for his jackknife and he let her take it; that she sat down on the bed, took a two ounce bottle of chloroform out of her bosom and with the jackknife cut the label off, saying to the witness that Estella Bates bought the chloroform at Hoosick Falls; that as the petitioner and the witness started to go out, the petitioner directed the witness to take off his shoes and at the same time she took off hers, and in that way they passed down stairs and out of doors; that after going out they put on their shoes, waited some minutes, and then went through the fence following the path into Morgan's Grove, the petitioner taking the lead and the witness following her; that they went down to the stone wall by the river bank; that after waiting about half an hour for Marcus Rogers, who did not come, the petitioner went to see if she could find him, and when she came back he was with her; that the petitioner said to Marcus, "sit down on the wall," whereupon he sat down and they went to talking about how he was getting along, what he was doing, where he was working, and how his health was; that she said to Marcus, "Let's sit down on the ground beside the wall, it is warmer," and asked the witness for his overcoat; that she took the overcoat, laid it down lengthways of the wall and all three sat down, Marcus being between the witness and the petitioner;

that the petitioner then said to Marcus, "You get up, this does not sit right," whereupon he got up and she took the overcoat, spread it on the ground and Marcus sat down, laid his head in her lap, and they went to talking about the same things as before; that the petitioner then said to Marcus, "Estella Bates showed me some tricks today with a rope," and at the same time she asked the witness to take the rope which they had brought with them; that the petitioner took the rope, asked Marcus for his hands, and she tied them behind him; that the first time she tied them he got them apart, she tied them a second time, he took them apart again, whereupon she asked the witness to take the rope and try it, which he did with like result the first time, but as the witness was tying the rope the second time Marcus said to the petitioner, "what are you doing"? she said, "nothing"; that in the meantime the petitioner had taken out the chloroform bottle, and the witness kept on tying the rope; that she turned the chloroform onto some handkerchiefs, tipped Marcus over with his head in her lap and put the handkerchiefs under his nose; that Marcus then turned over and said "stop it," but she kept on, calling to the witness for help; that the witness helped hold Marcus, who, in about two minutes, was dead; that by direction of the petitioner the witness cut the rope off Marcus's hands and rolled him into the river; that as he was rolling him in, the petitioner took from Marcus's pockets his insurance papers; that the rope thus used the witness took with him from his father's place by the petitioner's direction, the petitioner then telling the witness the use she wanted to make of it; that after the body was rolled into the river the petitioner carried the chloroform bottle back with her, and the rope she threw into the back yard of the witness's father's house; that the petitioner wound the handkerchiefs which had been used in chloroforming Marcus, around the chloroform bottle and wrapped them in paper

and directed the witness to throw them under the water closet, which he did; that the petitioner pinned a note written by her upon Marcus's hat and tied the hat to a bough of a tree some distance away from the place of the homicide and near the path in Morgan's Grove; that the witness and the petitioner got back to the house at half past twelve o'clock and went to bed; that after the body was found the witness confessed the crime, showed Deputy Sheriff Nash where the chloroform bottle was, also the rope, and assisted him in getting the bottle with the handkerchiefs and paper tied around it from under the water closet, also went with him and pointed out the route that he and the petitioner took on the evening of the homicide in going to the place where the crime was committed; that on the night of the homicide the petitioner told the witness that the man killed was her husband, that she wanted the insurance money to buy furniture to go to keeping house; that she was going to keeping house with Morris Knapp who had also been boarding at the witness' father's house, and when there had occupied the same room and bed with the petitioner; that during the week of the homicide Morris Knapp was in attendance upon the muster of the state militia of which he was a member, at Burlington.

The witness was cross-examined at length by the petitioner's counsel and in some respects made contradictory statements, and some questions he did not answer; but regarding the particulars of the homicide and the part which he and the petitioner respectively took in the same, his testimony in chief was not materially changed or shaken. The witness testified in cross-examination that when he first confessed the crime he was scared, also that he had been informed by his brother Levi that the state's attorney and his assistant, Mr. Barber, had said that if the witness would go on the stand and testify to the truth he would be let off upon a charge of man-

slaughter and he would not get more than three or four years' imprisonment, and that it was under such promise, representations, and hope that he had testified.

Attached to the petition for a new trial are the affidavits of William S. Lovell, E. W. Oakes, and Edward B. Flynn who were together at the State prison at Windsor on the 31st day of January last. These affiants testify that Leon Perham then told them that when he testified against the petitioner at her trial he lied and had to do it in order to save his own neck, or as one of them puts it to save himself, and upon this statement as shown by these three affidavits the petitioner relies as one ground for a new trial. So far as these affidavits show, all Leon then said to the affiants was that he had lied when he testified at the trial. In what respect he lied he did not state. It may have been regarding some of the particular things concerning which he gave contradictory statements in his cross-examination as above stated. It appearing by the transcript of the evidence given at the trial that he did so contradict himself, the Court is not warranted in saying that his statement to the affiants had reference to anything else. The matter of these contradictions was before the jury for consideration in determining how much weight they would give his testimony. It is argued by the petitioner's counsel that his statement to these affiants is of much force because of his testimony at the trial that he had been promised immunity by reason of which he gave his testimony. But this was also a matter for the jury to take into consideration, and that it might not be overlooked, in the charge to the jury their attention was particularly called thereto and they were instructed that while it was not claimed on the part of the respondent that any one in the authority of the State had held out any inducement to Leon to testify, and that the State was not responsible for what any one else had done,

yet, if his mind was affected by what some one else had told him in that regard they should consider it and say whether that fact in any way colored the testimony which he had given in court. In addition to this the testimony given by him at the trial in very many of its material respects was so corroborated by other witnesses and circumstances as to render it certain beyond a reasonable doubt that he had told substantially the truth. Under such circumstances these three affidavits have no material force as a basis for a new trial.

The evidence on the trial tended to show that the cause of the death of Marcus Rogers was asphyxiation or suffocation caused by the shutting of the glottis upon the holding of handkerchiefs saturated with chloroform to his nose.

Attached to the petition is the affidavit of Louis Z. Haussler, an undertaker and funeral director in the village of Hoosick Falls, state of New York. The affiant states that on or about the 13th day of August, 1902, he was employed by one William H. Rogers to prepare for burial the body of his brother Marcus Rogers; that while he was engaged in so doing at the residence of the said William in Hoosick, the affiant discovered "a compound multiple depressed fracture of the skull on the back upper side of the skull just over the ear," which fracture he says was not made after the body came into his charge for burial. It is argued for the petitioner that this evidence tends to show that the death of Marcus Rogers may have been due to a blow which caused this fracture and not to asphyxiation, also that the blow causing this fracture must have been given by Leon Perham, and that this is the respect in which he lied in giving his testimony, and is what he referred to in making the statement he did to the affiants Lovell, Oakes, and Flynn. But the Court cannot conjecture that he had reference to this or any other particular thing upon the naked statement to them that he lied. More-

over, the evidence at the trial shows that the autopsy on the body of Marcus Rogers was performed by Dr. E. B. Daley and Dr. H. J. Potter of Bennington on the day the body was taken from the river and the day following. In their testimony they were asked to state fully what they did and what they observed in performing the autopsy. So far as is material to this question their testimony was, in substance, that the clothing was wholly removed from the body; that they made an inspection of the body and on the face there were some marks like punctures or scratches, upon the left ear there was a cut, and over the right eyebrow there was a slight and insignificant looking bruise; that the skin over a portion of this bruise was slightly broken, maybe a quarter of an inch and not over half an inch; that they removed the brain from the skull and in so doing they inspected the underside of the bruise over the right eye. By such an inspection that bruise was found to be somewhat more extensive under the skin than appeared externally. The brain was found to be in a normal condition. The lungs and heart were removed and inspected, and evidence was given particularly concerning these organs and their conditon. Wet sawdust and sand were found in the clothing, in the hair, in the mustache, in the hollow of the ears, in the mouth, and about the teeth. The glottis was found closed and no foreign substance of any kind was found below it. Not only do neither of these physicians testify to finding a fracture such as is described by the affiant Haussler, but Dr. Potter, after describing what they did find as above stated, expressly says he thinks that was all the scars or marks they found on the body. It is inconceivable how such a fracture could have then been upon the body and these doctors, performing the autopsy as they did, not discover it. Further, the chloroform bottle having a few drops of chloroform in it with the two handkerchiefs wound around

it wrapped in a paper, was found under the water closet where Leon Perham testified that he put it, and when thus found it had the smell of chloroform. Dr. Daley in testifying was asked the question: "Suppose a handkerchief were saturated with chloroform, with a considerable quantity of it, and that the handkerchief so saturated was applied with force and held to the subject's nose and mouth and retained there for some time, two or three minutes, what would you expect would naturally follow from that application of the chloroform?"

It will be noticed that this hypothetical question is based upon the evidence as given by Leon Perham in describing how the crime was committed. The Doctor answered: "I should expect it would produce a spasm of the glottis, the glottis would shut tight, and held for two or three minutes there in that manner, that operation, that proceeding, would cause death by asphyxia or smothering." The witness further testified that in his opinion death was caused by asphyxiation produced by chloroform applied in that way. Doctors Potter and Wiltse gave their opinion to the same effect. In addition to this, Leon Perham in his cross-examination expressly states that neither he nor the petitioner struck Marcus Rogers any blows at the time of the homicide. In view of the evidence given at the trial in this respect, we do not think the testimony of the affiant Haussler is of sufficient force to create any doubt in the minds of a jury upon the question of the cause of death.

The only other ground upon which the petition is based is that of the mental condition of the petitioner when the crime was committed. The other affidavits attached to the petition bear upon that question, and it is argued that they tend to show that the petitioner was then insane and not responsible for her acts, or at least that they are sufficient to reduce the degree of the crime found.

The affiant Mary A. Hayes, a resident of the village of Hoosick Falls, testifies that during the years 1893 and 1894 she well knew the petitioner and attended school with her in that village; that the affiant distinctly remembers that the petitioner was the butt of ridicule of nearly all the students then attending school on account of the many peculiarities which the petitioner possessed. "One particular peculiarity being the decorating of her hair and clothing with ribbons and bows of many and varigated colors, on account of which she presented a fantastic appearance which drew upon her the ridicule of her schoolmates and the sobriquet of 'the mope' from them, by which she was generally known by all her schoolmates." The affiant further says that the petitioner was backward in her studies, was of low intelligence and very weak mentally. The affiant Helen F. Corcoran of the same village testifies to her attending school with the petitioner during the years 1894 and 1895. In most respects her affidavit is like that of Mary A. Hayes and largely in the same words, the only difference being that in the latter nothing is said in regard to the "sobriquet," but it states that the petitioner apparently took much pride in the ridicule of her schoolmates, which is not in the former. The affiant Charles W. Corcoran testifies that the petitioner worked for his mother as a domestic for several months during the year 1897; that for several years prior thereto he knew the petitioner, having frequently met her while in attendance at school at Hoosick Falls, and that she "was the subject of much ridicule from her schoolmates because of her foolish actions," and "because she appeared" to the affiant "as a child with a weak mind." That while petitioner worked for the affiant's mother he had some opportunities to observe the petitioner, her conduct, and actions and knew her to be "an impulsive, emotional person of very nervous disposition and excitable temperament, a person

of very low intelligence and mentally weak." The affiant William Stinton testifies that the petitioner worked for him as a domestic several months during the year 1897, and that he had much opportunity to study her "peculiarities and characteristics;" that while her outward appearance "was that of an ordinary intelligent person," affiant knew her "to be a person of very low intelligence, possessed of a very nervous disposition, excitable temperament," and "very weak mentally." The affiant Teresa Smith testifies that she has been intimately acquainted with the petitioner since her early childhood; that she frequently noticed that the petitioner acted strangely and she does not believe that the petitioner was at all times sound mentally; that the petitioner was a person of low intelligence and was known to the affiant as a person at all times weak mentally.

These five affidavits are in substance the same regarding the petitioner's low order of intelligence, but this fact neither shows nor tends to show insanity. Three of the affidavits tend to show the petitioner's peculiarities while attending school, and two of them that she was in the habit of decorating her clothing with ribbons of various hues and colors, thereby creating a "fantastic appearance," and that she was the butt of ridicule of the other scholars. These peculiarities of the petitioner and the ridicule of her schoolmates may easily be accounted for by the degree of her intelligence. The fact that a girl wears ribbons of various hues and colors has no more tendency to show insanity than do the same characteristics in females of mature years, who take pleasure in adorning themselves in different colors or in a manner more striking to the eye, which attracts attention, or in a boy by the various neckties of bright colors, which he wears when in his teens.

Standing alone these facts have no tendency to show insanity. It is only when they are closely connected or combined with other actions or peculiarities that they can have such a tendency. No connections or combinations are disclosed to give them such character, hence as evidence, at most they can only show the petitioner possessed of such mental peculiarities as to render her more predisposed to insanity than persons in general. *Willis* v. *People,* 32 N. Y., 715. The statement of the affiant Teresa Smith that she frequently noticed that the petitioner acted strangely and the affiant did not believe she was at all times sound mentally is of no force, for non-experts in testifying to sanity or insanity must first state what they have observed upon which they base their opinion. Such a basis is essential to the admissibility of the evidence. *Foster's Exr's* v. *Dickerson,* 64 Vt., 233.

The affiant Leroy D. McWayne, a resident of the village of Hoosick Falls, testifies that he has been a practicing physician for thirty years, and for twenty years last past in that village; that he is acquainted with the petitioner, having on many occasions for several years treated and prescribed medicine for her professionally previous to August 12, 1902; that the affiant was well acquainted with Marcus Rogers, the husband of the petitioner; that on or about August 7, 1902, Marcus Rogers called at the office of the affiant and asked him if the petitioner had been calling to consult him professionally, and upon being answered in the affirmative, Marcus informed the affiant that he expected she would soon call again, and he then requested the affiant not to treat her nor to give her any medicine or any other drugs she might call for; that Marcus then said the reason he made the request was that the petitioner had of late been acting strangely, he did not believe she was of sound mind, and he feared if she obtained any dangerous medicines

or drugs she might do herself or some one else bodily injury; that on Sunday, August 10, 1902, a few days after Marcus was at the affiant's office, the petitioner called again and demanded that he should prescribe for her certain drugs and medicines which he knew to be dangerous; that the affiant then observed that the petitioner was in a highly nervous mental state and refused to prescribe for her or to furnish her with the drugs and medicines desired; that the petitioner thereupon flew into a violent passion, soundly berated the affiant for refusing her request, and threatened to kill him if he didn't prescribe for her as she requested; that the affiant then tried to reason with and calm her, and after calling for assistance and using much persuasion induced her to leave his private office and go into his reception room, where he had a long conversation with her and where, in the presence of his wife, he examined the petitioner as to her sanity and mental state; that after a careful examination of the petitioner the affiant determined that she was then suffering with puerperal insanity; that on said Sunday, August 10, the petitioner was temporarily insane, caused as the affiant believes by pregnancy, in which condition she was at that time.

The only force which can be given to this affidavit as to what Marcus said is, that it served to call the affiant's attention to the condition of the petitioner; other than that it is hearsay and cannot be considered. The affiant testifies that the petitioner called at his office on the date named and demanded that he should prescribe for her certain drugs and medicines which he knew to be dangerous, and he observed that she was in a highly nervous state of mind and flew into a passion and threatened to kill him if he did not prescribe for her as requested. Other than this he testifies to nothing that she did or said while there as a basis of his opinion that she was then temporarily insane, nor does he state what he

did by way of examination, nor upon what he bases his opinion that she was suffering from puerperal insanity. We recognize the rule that the opinions of experts are not to be received as evidence unless based upon facts testified to by themselves or by others, as laid down in *Wetherbee's Exr's* v. *Wetherbee's Heirs,* 38 Vt., 454, and in *Foster's Exr's* v. *Dickerson,* before cited, however we are not disposed to apply it in this case and the petitioner will be given the full benefit of Dr. McWayne's testimony.

We are satisfied from the evidence introduced at the trial, however, that the affiant is mistaken as to the day when the petitioner was at his office—that it was not on the 10th day of August but must have been earlier. We assume that it was near that day and so treat it.

The affiant Jane Smith testifies that for many years she resided in the town of Hoosick as a neighbor of Charles Bennett, the father of the petitioner; that at the time of the birth of the petitioner the affiant was in attendance upon the petitioner's mother, Johanna Bennett, and assisted in nursing her during confinement and helped care for her sometime after the birth of the child; that during the time she was thus in attendance upon the mother, Charles Bennett acted strangely and violently at times and apparently had an insane desire to do injury to his wife while she was in bed; that he frequently exclaimed in a loud manner and while in a violent temper that he would kill the mother and that if a child were born to him he would kill it; that during all this time the wife was in great fear that her husband would do her great bodily injury; that a few days after the birth of the child the affiant heard the mother calling for aid, saying that the father was trying to kill the child; that the affiant then hastened into the bedroom in which lay the mother and child and there found the father trying to kill the child by smothering it with the bed

clothes which he was holding tightly over the face of the child; that the affiant with the aid of others forced him from the room; that for several years before and after the birth of the petitioner the affiant frequently met and well knew the father; that he was addicted to the use of alcoholic liquors and "was of a low depraved mentality and was weak intellectually;" that he frequently and at the slightest provocation flew into a violent passion and at such times acted in an insane manner toward his wife and others; and that he was a degenerate, and his actions were those of a person of unsound mind and the affiant believes that he "was a victim of moral insanity."

The affiant William Brant, a resident of the village of Hoosick, testifies that he has known the petitioner since her birth, and that he well knew her father, Charles Bennett, and her mother, Johanna Bennett; that the mother is a woman of "very low intelligence and mentally weak;" that the father was addicted to the excessive use of alcoholic liquors and while in an intoxicated condition and frequently at other times acted in a violent and abusive manner towards his family and treated them most inhumanly; that he "possessed a low depraved nature, was mentally weak, and was a moral degenerate;" that the affiant is informed and believes that Charles Bennett upon several occasions after the birth of his child attempted to take her life; that he knew the petitioner from infancy until she grew to womanhood and frequently observed that she had many of the characteristics of her father and mother; that as a child she was "possessed at times of an ungovernable temper, impulsive, and apparently incapable of acting and behaving like other people;" that she "was of very low intelligence and of a nervous disposition, excitable temperament, and a person very weak mentally." So much of

this affiant's testimony as is on information and belief is but hearsay and will not be considered.

The affiant Johanna Callahan, the mother of the petitioner, testifies that Charles Bennett, now deceased, was her husband and the father of the petitioner; that during all the time she lived with him and from the date of their marriage he was addicted to the use of alcoholic liquors and frequently came home beastly intoxicated and would severely beat, wound, and ill-treat the affiant and demand whatever money she had saved from her labors that he might obtain more liquor; that he would frequently be taken with a fit of violent anger and at such times seem to be possessed with an uncontrollable and morbid impulse to do the affiant or some other person violent injury, and at such times seemed to be without will or reason; that he "was illiterate, was possessed of a low depraved nature, was morally a degenerate and was mentally weak;" that for some time previous to the birth of the petitioner said Charles "became more venomous and insane in his actions toward" the affiant, frequently in a violent passion threatening to kill the affiant before her child should be born, saying that he would surely kill the child as soon as it was born; that on account of the violent and insane actions of the husband, the affiant was constantly in fear of her life; that a few hours before the birth of the child the husband in one of his insane moods and fits of violent passion and while the affiant was seriously ill in bed came into her room, barricaded the door from the inside, and threatened to kill her; that a few days after the birth of the child and while affiant was yet in bed with her new born babe, he came into the room where they were, saying that he intended to kill the infant, and made an effort so to do by smothering it with the bed clothes which he held tightly over its head and face; that the affiant was unable to offer any resistance but called loudly for help, and that help

came and "ejected" him from the room; that thereafter her husband went away from home and she did not see him again for several months; that when the petitioner was about six months old the affiant and her husband with their child, the petitioner, went to Utica, N. Y., and when in their room at the hotel there he made several attempts to kill the child by poisoning her with laudanum, and in one of these attempts nearly succeeded; that the affiant noticed him giving the laudanum to the child, "and noticing that the child was in distress immediately obtained the services of a physician who after several hours' labor resuscitated the child and saved her life."

The testimony of these three affiants fairly considered tends to show that Charles Bennett was a man of a low depraved nature, mentally weak, of a violent temper, and that he at times severely beat, wounded, and ill-treated his wife, and threatened to kill her and the child when born, and on one occasion attempted to smother the child, and on others to poison it with laudanum; also that during all the time covered by their testimony he was addicted to the excessive use of alcoholic liquors and frequently came home beastly intoxicated. The fair inference from this testimony is that his violent actions and threats shown were largely if not wholly when he was under the influence of intoxicating liquor. The testimony of the petitioner's mother bearing upon this point is hardly susceptible to any other construction.

The affiant Jane Smith says that he apparently had an insane desire to do injury to his wife while she was in bed, that he frequently and at the slightest provocation flew into a violent passion at which times he acted in an insane manner towards his wife and friends, and that "his actions were those of a person of unsound mind," and the affiant believes that he was a "victim of moral insanity;" and the affiant Johanna

Callahan speaks of his "insane actions" and "insane moods." Other than this there is nothing in the affidavits given by the last three affiants named tending to show insanity, except what may be inferred from the actions described which, as has been seen, were to a large extent if not wholly when the said Charles was more or less intoxicated.

It appears from the evidence attached to the petition that Patrick Dwyer, a brother of the petitioner's mother, was declared insane on the 20th day of April, 1886, and committed to the Hudson River State Hospital at Poughkeepsie, N. Y., on the same day as an insane person, where he remained until the 4th day of August following, when he was discharged as improved, and that he was suffering from a form of insanity "known as acute melancholia with suicidal tendencies." The affiant Barney Smith testifies that on or about the 17th day of March, 1886, the said Patrick Dwyer, as the affiant is informed and believes, while the said Patrick was temporarily insane, attempted suicide by cutting his throat, and that thereafter the affiant assisted in watching and attending him at his home. The evidence given by the affiant upon information and belief of the attempted suicide can have no force as it is only hearsay, but the fact that he assisted in watching and attending Patrick was a matter within his own knowledge concerning which he can give testimony.

Whether any insanity which the evidence tends to show that the petitioner's father had, or the insanity of her uncle Patrick Dwyer, can legally be considered as transmissible without evidence tending so to show as a fact, we have neither considered nor determined. For all purposes here we shall assume that in each case it was of a type transmissible. Proof of hereditary insanity, however, is cumulative evidence only, and it is not admissible until a foundation has been laid by the introduction of evidence of insanity in the person whose

mental condition is in issue. *State* v. *Van Tassel,* 103 Ia. 11; *Laros* v. *Commonwealth,* 84 Pa. St., 200; *State* v. *Cunningham, 72* N. C., 469.

Counsel for the petitioner have quoted in their brief largely from medical books on insanity, but such books are not evidence; for they are statements without the sanction of an oath and made by persons not present and not liable to cross-examination. *Ashworth* v. *Kittredge,* 12 Cush. 193, 59 Am. Dec. 178; *Huffman* v. *Click, 77* N. C. 55; *People* v. *Hall,* 48 Mich. 482, 42 Am. Rep. 477; *Tucker* v. *Donald,* 60 Miss. 460, 45 Am. Rep. 416.

The question then is whether the newly discovered evidence tending to show insanity of the petitioner at the time of the homicide is of such force as reasonably to warrant the belief that a new trial would result in a different verdict. Upon this question it becomes necessary to examine with care further the evidence given at the trial.

The petitioner was born March 9, 1883. Marcus Rogers and the petitioner were married December 18, 1898. In the following spring they went to keeping house in Shaftsbury and continued to keep house there and at other places until January 7, 1902, when they broke up housekeeping at Hoosick, and she went to Bennington and he went to work for William Rogers, his brother, in Hoosick where he remained and continued to work until his death. The petitioner henceforth roomed and boarded in Bennington until after the homicide. During the time while they were thus living apart she was at William Rogers's six or seven times, the last of which was in July, and on two or three occasions in the winter and spring she remained there over night, and on one occasion for two nights and a part of three days. Marcus also saw her at Bennington on different occasions within the same period of time.

Several witnesses testified at the trial that previous to the homicide the petitioner told them severally that her husband had tried to get her to go to Hoosick to keep house with him and that she would not go. Several witnesses testified to hearing him ask her to go home with him for that purpose and that she refused; several witnesses testified to seeing the petitioner and her husband together on Cooper's bridge about six o'clock in the evening of the homicide, and several, that she told them after the homicide and before the body was discovered that she last saw him about six o'clock on that afternoon, and expected to meet him again that evening but did not.

One witness, the insurance agent, testified that he talked with her about the insurance upon her husband's life as early as in the last part of July on two different occasions and told her that she was the beneficiary named in the policy. Two or three other witnesses testified that before the homicide she told them severally regarding the insurance upon her husband's life, and one, that it was made out in her name. In talking with Morris Knapp, Leon Perham, and Levi Perham severally before the homicide, she spoke about having the insurance money with which to buy furniture to go to housekeeping, and the last named witness testified that on the Sunday night next before the homicide she tried to arrange with him to get a rig and take her to Hoosick Falls the next day to murder her husband, in substantially the same way as it was later done; that she then said she had the chloroform. That the witness asked her why she wanted to do it, and she said that he had some insurance and he owned a little place or property which was in her name and she wanted it, to go to keeping house with Morris Knapp.

Three witnesses testified that Marcus Rogers came to the house of his sister, Mrs. Francis Phillputt, off Beach street in

Bennington, between half past six and seven o'clock that night, ate supper there, and went away between eight o'clock and half past the same evening; that while there he took his insurance book and the envelope containing the same out of the inside pocket of his coat, showed the book to the witnesses, talked about it, put it back into the envelope and then put them into his pocket again, and thus carried them off with him; that when he went away he left his umbrella and a bottle of medicine at the Phillputt house. The testimony of Leon Perham was that the petitioner took these insurance papers out of Marcus Rogers's pocket after he was dead and when his body was being rolled into the river. Two witnesses testify that in the afternoon of the day following the homicide the petitioner went to Mrs. Phillputt's house; that nearly the first thing said to her when she got there was that Mrs. Phillputt asked her what she had done with "Mark," to which the petitioner answered that she had not seen him since the evening before, about half past six, on Cooper's bridge, and said she felt worried about him and asked if he had been there; that she said she and her husband had a quarrel and he said she would never look on his face alive again, and when asked what the quarrel was about she said he wanted her to live with him, that he wanted her to go to housekeeping with him and she would not do it, and that he threw his insurance book into her lap; that she asked the witnesses if they thought it necessary to call out the fire alarm to find him, and was told they didn't think it was necessary; that she said she felt as if something had happened to him and she felt as if he had drowned himself; that the witnesses told her to hire a team and go out to his brother's to which she said she didn't want to and further said that he would not go home and leave his umbrella and medicine there. The witnesses further testified that up to that time nothing had been said about the umbrella or

medicine by the petitioner or in her hearing, and that neither the umbrella nor medicine were within sight of the petitioner, except that not quite all of the lower half of the umbrella could be seen where it was hanging in the corner of the room under a jacket.

The insurance agent before referred to testified that when the petitioner called at his office at his request on the day of the inquest she had the insurance book and envelope in her possession.

The state muster was from August 7 to August 13 inclusive. Knapp testified that in July he and the petitioner had a talk about getting married and that just before he went to muster she spoke to him about getting furniture of Charles Potter, a furniture dealer in Bennington. What took place between the petitioner and Potter, and the mental condition of the petitioner at that time, may best be understood from Potter's testimony given here in detail:

"Q. 5. In August, 1902, did you see the respondent, Mrs. Rogers? A. I did.

Q. 6. And where? A. In my store.

Q. 7. Where was your store then? A. On Main street, the north side of Main street.

Q. 8. And this side of Cooper's bridge? A. Yes sir.

Q. 9. Was it about half way between Cooper's bridge and the Putnam house? A. I should think it was just about.

Q. 10. You say you saw her at your store. Now did you know her by sight before that? A. I never had seen her until she was in my store.

Q. 11. Can you tell about what time of the month it was when she first came into your store? A. It was either two or three days before the Guards went to muster.

Q. 12. When you say the Guards, you mean the company of militia here or the Bennington Rifles? A. Yes sir.

Q. 13. Did she tell you what she came there for? A. Yes sir.

Q. 15. Now you may state what she said about this furniture when she first came there, state the whole conversation you had about it. A. The first time I met the woman she came into the store and said she wanted to look over furniture and we looked over the different things in the store and then she decided upon a chamber suit.

Q. 16. You say she decided upon a chamber suit, what other talk did you have with her at that time. Did you ask her anything? A. Yes sir, I asked her her name.

Q. 17. Did she tell you? A. She said it was Rogers.

Q. 18. Did you ask her anything else? A. Yes sir, I asked her if she was going to get married.

Q. 19. What did she say? A. She said she intended to.

Q. 20. Did you ask her anything else? A. Yes sir.

Q. 21. What? A. I asked her whom she was going to marry.

Q. 22. What did she say? A. She said she didn't know as she cared to tell me.

Q. 23. Without my asking you, did you ask her anything else either time, go right on and state all the conversation at that time, I wish you would? A. She said she was intending to be married and she wanted to see about furniture and I then asked her whom she was going to marry, and she said she was going to marry a young fellow in town who was a painter but she didn't care to give any names, she said that she didn't like to have folks pry into her business. I told her of course the reason why I wanted to know was because I wanted to know whom I was trusting for the goods. Then I told her if the young man didn't care to be known himself that at night time to have her and him come into the store and

look over things and if she didn't care to reveal his name, I would know by that who the party was. I should say three days from that time she came back again, and she said that the young man knew me, that he was earning good wages but he had gone to the muster and everything was left with her and she wanted to pay me at the time he got back from muster $10.00 for the suit and the other things she would not purchase at that time.

Q. 24. In addition to the chamber suit did she look at any other housekeeping or household furniture when she was first there? A. She did, yes sir.

Q. 25. You may state what she looked at, in a general way? A. She selected nothing for certain but the chamber suit, but the other goods she looked at and talked about were tables and chairs, etc. She just went through my stock looking over my goods.

Q. 26. Whether or not she inquired the prices of the various articles she looked at? A. She certainly did, because I gave her the prices of the different goods as we were looking them over.

Q. 27. Now you have told about her coming to the store twice, do you remember whether she came there more than twice? A. I am quite sure all her calls at the store are three times, to the best of my memory.

Q. 28. Have you told us what transpired the third time? A. Nothing more than coming in to see if I was keeping the goods and have a talk about them.

Q. 29. Nothing especial then in addition to what you have already testified? A. No sir.

Q. 30. Did she say anything to you as to when she intended to be married or intended to go to housekeeping? A. She did not.

Q. 31. Now did she say anything further with reference to the matter of payments, you have already told about that, that she wanted to pay ten dollars down, now at any other time did she say anything further about payments? A. Yes sir.

Q. 32. When was that? A. That was the second time when she came into the store.

Q. 33. What did she say then? A. Why, she wanted to know how much time I could give on the balance of the furniture and I told her I would give her a reasonable length of time, and she wanted to know what I considered a reasonable length of time and I told her from thirty to sixty days, anything that was reasonable I was willing to give her. She said of course if she didn't need the balance—of course ten dollars that she paid, I could keep that, it was a matter of placing so much in my hands with the expectation of paying the balance in a reasonable length of time.

Q. 34. Is that all you think of that she said with reference to the method of payment or the amount of payment? A. It is, yes sir.

Q. 35. Whether or not anything was said by her to you about the lumping? A. It was to be paid in a lump. She said, "If you get your pay in a lump within a reasonable length of time that is all you need to know about this," or words to that effect. I would not say those were the exact words.

Q. 36. But that is as near as you can remember? A. Yes sir.

Q. 37. She didn't say anything to you at any time as to what the man she was going to marry had said to her about the purchase of the furniture? A. No sir, not a word, only I was to have my ten dollars when he got back from the muster."

After the body was found it was taken to the Perham house. One of the selectmen who then had the body in charge testified at the trial that when it was taken to the Perham house he saw the petitioner there. He was asked to state what talk he had with her and answered:

"I told her I had brought the body of her husband and she said she was only a boarder there and she could not very well care for it and asked if the town would not bury it. I said 'No', the town would not bury it, the proper place to take it was to her and let her take care of it. In the course of the conversation she wanted me to take it to his aunt's, Mrs. Phillputt's, and I refused to do that. Then she suggested I take it to his brother's in Hoosick and I refused to do it. Then she suggested that if he had poisoned himself would not the town bury him and I said 'No,' I said the place for him was right with her, and after a while she went and talked with the people and some young man came and said 'better let him bring it in' and then she consented;" that she also said she didn't own the house or control it and she didn't know whether the body could be brought in there or not.

The witness was then asked how she appeared at that time and answered that she was perfectly calm and not excited.

Knapp further testified that on his return from muster Wednesday evening she was in front of the armory and they went to Perham's together and stayed that night; that she told him that she last saw her husband between half past six and seven the evening before at Cooper's bridge, that her husband wanted her to go to live with him but she refused and he gave her the insurance policy and told her he had nothing to live for; that he had threatened to commit suicide and she was worried about him; that on Thursday morning after the body was found she asked the witness what he

thought about having it brought to the Perham house, and he told her he thought it would be policy to have it put there; that on the evening of that day the witness received a note from the petitioner asking him to come down to Perham's and spend the evening as it was lonesome, and after her arrest and while she was in jail at Bennington, he received a letter from her in which she said: "My God, Perham has let it all out."

Several witnesses testified that after the homicide and before the body was found the petitioner told them severally that she last met her husband about six o'clock Tuesday evening; that he tried to have her go back to William Rogers's with him, and when she refused he threw the insurance papers into her lap and said he had nothing to live for, and that he talked about poisoning himself and drowning himself, and she feared that he had committed suicide and that his body would be found within the limits of the village of Bennington.

While the autopsy was being performed she asked the doctors performing the same, two or three times, if they found any poison in the stomach, or if they found any traces of poison.

Mrs. Perham testified that after the body was discovered the petitioner told her in effect that she was going to have $500 insurance money and if the witness would let the body be put in her house the petitioner would pay her. The witness further testified that during the time of the inquest the petitioner said to her: "You and Leon are wanted down there," and that she said to Leon: "I want you to go down and testify as I want you to."

Several witnesses testified to the finding of the hat tied to the bough of a tree in Morgan's Grove with a note pinned to it. The hat was identified as that belonging to Marcus Rogers, and the handwriting of the note was by the evidence

of several witnesses, some of them experts, shown to be that of the petitioner. This note purported to have been written by Marcus Rogers and read as follows: "Blame no one as I have at last put an end to my miserable life as my wife knows I have every threatened if, every one knows I have not anything or nobody to live for no one can blame me. And so blame no one as my last request.

Marcus Rogers.

May I hope you will be happy."

Six or eight witnesses who testified to her declarations subsequent to the homicide and before her arrest regarding her husband, when she last saw him, how she feared he had committed suicide, her inquiries of the doctors during the autopsy, and of the selectman relative to the town's burying the body, her talk at the house of the Phillputts, say in effect that she was cool and not excited with the exception of two of the witnesses who saw her at Mrs. Phillputt's Wednesday afternoon. They say that when Mrs. Phillputt asked the petitioner "what she had done with Mark," they thought she acted a little nervous, as though she was worried about him.

We have not referred to all the evidence bearing upon her actions and declarations, nor is it necessary. The evidence to which reference has been made as well as other evidence not especially referred to strongly tends to show that she refused to go to keeping house with her husband upon his numerous requests, and that for sometime prior to the time of the homicide she was deliberately planning to get rid of him by taking his life and to that end sought the assistance of certainly two young men with whom she was criminally intimate, and when the crime was in fact committed it was done with the agencies which she and her accomplice had secured and carried with them for that purpose.

The note written by her and pinned to her husband's hat shows that in planning to commit the crime it was a part of the scheme to make it afterwards appear to be a case of suicide, and after the homicide, in the further carrying out of that plan, she advanced the theory and tried to create the impression that her husband had committed suicide. Her visit to the furniture dealer, her actions and sayings while there regarding the purchase of furniture and the payment therefor, and her getting married, etc., all strongly tend to show that she was in possession of her full mental faculties and acting understandingly.

She was then coolly and deliberately engaged in a business transaction, looking to the accomplishment of her purpose to effect the death of her husband, that she might get his life insurance and marry Morris Knapp.

The evidence discloses nothing in her actions or declarations prior to the time of the homicide nor afterwards tending to show that she was mentally unsound, or was in anywise irresponsible for her acts.

The evidence tending to show insanity of the petitioner is confined to the testimony of Dr. McWayne. So far as appears he was a general practitioner with no experience with phases of insanity which he describes beyond what that practice would give him. His affidavit stands entirely alone in support of any theory of insanity during the time of the petitioner's pregnancy. No relative or friend or other person with whom she associated has testified to any abnormal act or saying by her during that period. The case is destitute of any evidence that she showed any signs of insanity at any other time within the period of her pregnancy. It is to be noticed that the time when Dr. McWayne examined her was during the same week in which she was engaged in looking over and buying furniture at Charles Potter's store, the details

of which already appear. Her actions and declarations in that transaction instead of showing an unsound mind clearly show her to have been in full possession of her mental faculties, knowing what she wished to purchase, planning the ways and means for making payments, and arranging with the dealer regarding the same. Everything that Dr. McWayne's affidavit contains regarding her actions and declarations may be accounted for upon the ground of an outburst of temper.

It is significant that the petition for a new trial contains the evidence of no one in Bennington where she was staying for weeks prior to the homicide, nor of the doctors who performed the autopsy and saw her with her actions and sayings on that occasion, nor the selectman and health officer having the body in charge, nor of the persons at the jail where she was imprisoned before going to the House of Correction, nor of any one at the House of Correction where her child was born, showing their observations of her actions and sayings, and that in their opinion, based thereon, she was insane. In this connection it is to be noted that attached to the petition is the affidavit of Dr. E. G. Hall of the city of Rutland who testifies that he attended the petitioner during her imprisonment at the House of Correction when she was delivered of her child which occurred December 16, 1902, and his name signed to the affidavit shows that he was a physician to the House of Correction. The fact that, in that affidavit, he simply testifies to his attendance upon her at the time of the birth of the child and to nothing else, is very significant of the fact that there was nothing else that he could say in aid of the petitioner in seeking a new trial upon the ground of insanity; for otherwise it is fair to assume that the affidavit would have shown it. In *Doherty* v. *State of Vermont.* 73 Vt., 380, it is said: "If one's mental and moral faculties are so disordered and deranged that he cannot distinguish be-

tween right and wrong, or is not conscious at the time of the nature of the act he is committing, or if conscious of it and able to distinguish between right and wrong, yet if his mind or will is, involuntarily, so completely destroyed that he cannot control his actions, he is in a legal sense insane and is not subject to punishment for criminal acts committed when in such a state."

But it is not enough to say that the mind is so impaired that it is incapable of distinguishing between right and wrong, the mind must be so overcome that it has no power to resist the insane impulse to commit the deed, so that the act is the direct and immediate consequence and result of the insanity, in short that the deed is an insane act, in respect to which the reason is powerless. *Hathaway's Admr.* v. *National Life Ins. Co.*, 48 Vt., 335.

Upon consideration of the evidence introduced at the trial and of the affidavits produced in support of this petition, we can have no reasonable doubt that the petitioner at the time of the homicide had the mental ability to distinguish right from wrong, to fully comprehend the nature of the act she was about to commit and that she had sufficient will power to enable her to refrain from committing the crime. She deliberately exerted her will power to commit it. She as deliberately planned the theory of suicide to conceal the crime; and it was to this end that she told Mrs. Perham and Leon that they were to testify at the inquest as she wanted them to. Her own position at the inquest was one of ignorance of the means of her husband's death in the hope that the theory of suicide would be adopted. She had a sound and healthy mind in operation, not an unsound and diseased one. She had intelligence, not perverted intelligence. She reasoned, and it was the reasoning of sanity, and not of insanity.

The evidence at the trial strongly tended to show the petitioner guilty of murder by the wilful, deliberate and premeditated killing of her husband, and on a careful consideration of the evidence adduced in support of the petition it is not in our judgment of sufficient force to change the result were a new trial granted.

Upon the whole case the Court are of the opinion that *the petition ought to be, and the same is, dismissed.*

Rowell, Chief Judge, Tyler, Munson, and Start, Judges, concur.

Haselton and Powers, Judges, dissent on the question of insanity.

HASELTON, J., dissenting. I am compelled to differ with the majority of the Court, and feel bound to give some expression to the grounds of dissent.

The affidavits attached to the petition for a new trial tend to show that the petitioner, Mary Mabel Rogers, was born in March 1883; that she was of low mentality, emotional, and excitable; but the affidavits do not fairly tend to show a condition of general insanity. It appears that she was robust in body, and probably somewhat prematurely developed physically. It is sufficiently established that when she was about 11 years of age she attended school at Hoosick Falls, and that at that time she was so fantastic and eccentric as to be the butt of ridicule in the school, and that she seemed to take pride in the fact. Her condition at that time seems to have approached lunacy; and, as there is no evidence of the continuance of the peculiarities which made her ridiculous, they were not unlikely due to physical disturbances attendant upon her arrival at the age of puberty, which there is reason to believe was in her case somewhat premature. At the age of 15

years and some months she was married to Marcus Rogers. The marriage was performed by a clergyman, her age being certified to as 18. The deception in regard to her age was probably made possible by her somewhat premature physical development already referred to.

About March 16, 1902, when 19 years of age, she became pregnant, and a few months thereafter lapsed into gross immorality, carried on without concealment and apparently without shame. On or about August 7, 1902, Dr. Leroy D. McWayne, of Hoosick Falls, had his attention called to her condition in respect to soundness of mind, by Marcus Rogers, her husband. A few days afterwards Mary Rogers herself called on the Doctor at his office, and asked the Doctor to prescribe for her certain dangerous drugs. The Doctor had in mind the suggestion or caution received from her husband a few days before, and observed that she was "in a highly nervous mental state of mind," and he refused her request. "Whereupon," to quote now the exact language of the deposition of Dr. McWayne, "the said Mary Rogers flew into a violent passion, soundly berated this deponent for refusing her request, and threatened to kill this deponent, if he did not prescribe for her as requested by her. This deponent then tried to reason with and calm her, and after calling for assistance and using much persuasion, induced her to leave his private office and go into his reception room, where this deponent had a long conversation with the said Mary Mabel Rogers, and where this deponent, in the presence of this deponent's wife, examined the said Mary Mabel Rogers as to her sanity and mental state. That after a careful examination of the said Mary Mabel Rogers there and then, this deponent then determined that the said Mary Mabel Rogers was then suffering with puerperal insanity. This deponent further says that on

said Sunday, August 10, 1902, at the time said Mary Mabel Rogers called at this deponent's office, the said Mary Mabel Rogers was temporarily insane, caused as this deponent believes by pregnancy, in which condition she was at that time."

The Doctor had, on many occasions for several years previous to this time, professionally treated and prescribed medicine for Mrs. Rogers, and in arriving at his conclusions had the benefit of his knowledge of her mental and bodily makeup so derived. The Doctor was correct in determining that she was pregnant, for about four months later she was delivered of a still-born child. Was he mistaken in his diagnosis of her mental condition? His own affidavit is to the effect that he had been a practicing physician for 30 years, and had practiced for the last 20 years in the village of Hoosick Falls. Dr. George W. Lamb deposes that since 1880 he has been a practicing physician in the village of Hoosick Falls; that he has well known Dr. McWayne of that village for upwards of 20 years; and that Dr. McWayne is a highly respected person and a physician of high professional standing.

It is probable from the evidence in the case that Dr. McWayne is mistaken in fixing Sunday, August 10, as the day on which he made his examination of Mary Rogers; but this mistake, if it was a mistake, ought not to be treated as discrediting the affidavit of the Doctor. To do so would be to treat it in a manifestly unfair and unjust way. He says the examination of Mary Rogers was made a few days after the talk with her husband about her mental condition, and that that talk was on or about August 7. Whether this examination was made August 9, 10 or 11, is wholly immaterial; the precise day is immaterial. The tragedy of the death of Marcus Rogers was impending, for he was killed on August

12, and the affidavit of Dr. McWayne bears internal evidence of truthfulness, skill, and professional insight.

Dr. McWayne did not qualify as a specialist on insanity, but it was not necessary that he should do so. Reference is here made to *Hathaway* v. *National Life Insurance Co.*, 48 Vt. 335. In that case physicians and surgeons, one of whom was Dr. Goldsmith, testified as experts upon the question of insanity, without qualifying otherwise than as physicians and surgeons. No question was raised in the county court that these witnesses were not experts, but in considering objections to their testimony made on other grounds, the Supreme Court, speaking through Judge Pierpont, took occasion to say: "The principle is well settled that physicians and surgeons of practice and experience are experts, and their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice, and it is not necessary that a witness of this class should have made the particular disease involved in any inquiry a specialty to make his testimony admissible as an expert. If he has, that, perhaps, may make his opinion of more value than that of one who has not."

It is urged that Dr. McWayne does not give the "long conversation" which he had with Mrs. Rogers in his reception room, and that he does not expressly say that his opinion is based upon observations of her and conversations with her. But stress should not be laid upon this fact in the consideration of a matter which calls for solemn consideration, unembarrassed by technicalities. The affidavit sufficiently discloses what opinion the Doctor would give in another trial under any form of question that might be employed, and that he would have a substantial basis for his opinion.

Such being the evidence as to the insanity of Mrs. Rogers at a time of physical derangement, the affidavits tending to show insanity in those of her blood, at times of physical derangement, are treated as admissible, particularly since the evidence tends to show that those in whom it exhibited itself had her general temperament.

The affidavits in this case tend to show a predisposition to insanity, and insane acts, on both the father's and the mother's side. They tend to show that the father frequently threatened the life of his wife while she was with child, and that before Mary was born he frequently made threats that if a child was born to him he would kill it; that a few days after the child was born he attempted to kill her by smothering her with a pillow, but that he was baffled in this attempt; that when the child was about 6 months old he persuaded the wife to take the child and go with him to Utica, N. Y., and that there in a room of a hotel he made several attempts to kill the child, and that in one such attempt he so nearly succeeded in poisoning the child with laudanum that a physican was called, who saved the life of the child only after several hours of labor. The affidavits show pretty clearly that the father was a victim of alcoholism, and that his homicidal tendencies and attempts manifested themselves, for the most part, in connection with alcoholic indulgence. But the force of the evidence as to the doings of the father is this; that it tends to show that he was so constituted that a derangement of his physical functions gave rise to a homicidal tendency amounting to a homicidal mania. The affidavits tend to show that the same Charles Bennett, father of Mrs. Rogers, was mentally low and weak.

The newly discovered evidence as to insanity on the mother's side relates to Patrick Dwyer, a brother of the

mother of Mary Rogers. This evidence tends to show that Patrick was for a time insane, and was watched lest he should take his own life. No suspicion can be cast upon this evidence, as the said Patrick Dwyer was committed to the Hudson River State Hospital for the Insane on the affidavits of Dr. John H. Chipperly of Troy, and Dr. J. C. Harmon, of Hoosick. If the affidavits on which he was committed are looked into, and there is no reason not purely technical why they should not be examined, evidence is disclosed that he attempted suicide by cutting his throat, and, further, that he took an aversion to his children and threatened their lives. In *Hathaway* v. *National Life Ins. Co.*, 45 Vt. 335, this Court said: "Suicide, like any other extraordinary and unnatural act, has a tendency to show insanity." See also *Frary* v. *Gusha*, 59 Vt. 257, and cases there cited. The insanity of Patrick Dwyer was apparently of a temporary character, as after a few months he was discharged as improved. What the exciting cause was which in his case induced insanity does not appear; but as it was apparently somewhat temporary in its character, it is fair to presume that it was due to some exciting cause operating upon a mind predisposed to insanity.

Affidavit is made that the mother of Mrs. Rogers is a woman of very low intelligence and mentally weak, and that Mrs. Rogers possesses many of the characteristics of both her father and mother. It would not be improbable that such a woman, with such a taint of blood, would be temporarily insane during some period of pregnancy, as well as at other crises incident to motherhood or womanhood.

The affidavits accompanying the petition for a new trial are to be weighed with all the evidence taken on trial, but it is to be remembered that the defence of insanity was not made on the trial, and that the gleanings from the evidence that are

thought to bear on that question are mere gleanings from evidence that was introduced with reference to another defence.

As a reason why there was no neglect on the part of counsel in not interposing the defence of insanity, it is to be noted that counsel was not assigned for her until 5 or 6 months after the birth of the child, long after the condition which, in the opinion of Dr. McWayne resulted in temporary insanity, had subsided. The affidavits of Mr. Guiltinan, assigned to defend, and of Mr. Archibald, who assisted in the defence, show no laches, or, at least, none the consequences of which ought to be visited upon Mrs. Rogers in the situation in which she now stands.

Brief reference will now be made to the evidence on the trial of the petitioner, which, though the defence of insanity was not made, may be thought to throw some light upon the question of her insanity. It is urged, in effect, that in the killing of her husband, she proceeded with reason and shrewdness. In the majority opinion a standard of sanity is in reality set up, and in view of what is there said, it is permissible to quote from the opinion in *Hathaway* v. *National Life Ins. Co.*, 48 Vt. 335, where Judge Pierpont, speaking for the entire Court, well and forcibly says: "Insane persons may form plans and execute them, and manifest great shrewdness and mental activity both in forming and executing them. Insanity does not destroy the intellect—it perverts it, and often renders it more active than it is in its normal condition."

Evidence on the trial tended to show that shortly before the homicide, and when this insurance idea had taken possession of her, she at one time spoke of the insurance as $1,000, at another as $5,000, and at another as $500.

It appeared from the testimony of Leon Perham that about a week before the homicide she broached to Leon a

scheme for going to Hoosick Corners and making an arrangement for getting Marcus out beside the river and knocking him on the head and rolling him into the river. At that time she spoke of his insurance and called it $1,000. The evidence tended to show that two days before the killing of her husband she asked Levi Perham to take her down to Hoosick Falls for the purpose of aiding her in killing a man who, she said, had some insurance and a little property that was in her name and which she wanted. The plan that she developed according to the testimony of Levi was to get the man out and get him to play tricks and jump the rope and tire him all out and tie his hands, when she was to step back and hit him with a club, and Levi was then to put the chloroform to him. At this time her husband Marcus whom she thought to tire out by getting him to jump the rope was upwards of thirty years old. Levi testified that he told her he would do as she asked, but that he had no idea of doing so; that he assented so that she would not ask him again; that he did not know what to make of it.

The evidence tended to show that Mary Rogers in the latter part of July, told Morris Knapp that Marcus Rogers was her husband, and that at that time she told Knapp that she had been to Hoosick or Hoosick Falls to attend the wedding of Marcus to some one other than herself. The evidence tended to show that on the occasion of the autopsy she was in the room with the body a part of the time in the presence of two doctors and several other persons, with papers in her hands which in the presence of all she called her insurance papers.

The evidence tended to show other weird, strange, and unnatural actions and sayings of Mary Rogers at about the time of the homicide, and at about the time when in the opin-

ion of Dr. McWayne, she was suffering from the insanity of pregnancy.

We are of opinion that under the rule announced in the Doherty case, 72 Vt. 381, and under the rule stated in the majority opinion in this case, the petitioner should be accorded a new trial on the ground of newly discovered evidence of insanity. The other grounds on which the petition is based are, as presented, deemed insufficient.

Powers, J. concurs in the dissenting opinion.

CHARLES SEARS *v.* MARTIN DULING.

May Term, 1905.

Present: ROWELL, C. J., TYLER, START, WATSON, HASELTON, and POWERS, JJ.

Opinion filed July 22, 1905.

Infant Defendant—Appearance by Attorney—Continuance Without Appointment of Guardian Ad Litem—Effect.

An infant defendant seasonably entered an appearance by attorney at the term to which the writ was returnable, and the case was then continued, without the appointment of a guardian *ad litem*. *Held*, that the appearance by attorney was an appearance by defendant; and that, at the term to which the case was continued, the court had jurisdiction to appoint a guardian *ad litem*, and to proceed with the cause upon its merits to final judgment.

CASE FOR SLANDER. Heard on defendant's motion to dismiss the case, at the December Term, 1903, Windsor County, *Munson,* J., presiding. Motion overruled. The defendant excepted. The opinion states the case.

Davis & Davis for the defendant.

The motion should have been sustained. The infant never "appeared" till the December term, 1903. *Fall River Foundry Co.* v. *Doty*, 42 Vt. 412; *Fuller* v. *Smith*, 49 Vt. 253.

A continuance of a case, without an appearance by defendant, operates as a discontinuance. *Paddlefoot* v. *Bancroft*, 22 Vt. 536.

Joseph C. Enright and *Edward R. Buck* for the plaintiff.

START, J. The defendant, while a minor, was arrested on a writ returnable at the June term, 1903, of the Windsor County Court. An appearance by an attorney, having been seasonably entered, the cause was continued without the appointment of a guardian *ad litem*. At the following term the defendant appeared in person, and a guardian *ad litem* was appointed, and a motion to dismiss the cause was filed. The motion was overruled and the defendant excepted.

The defendant insists that he was incapable of appearing in the cause for himself; that he could not appoint an attorney to appear for him; that there was no appearance by him at the term the cause was continued, and that the continuance operated as a discontinuance.

The appearance by an attorney at the term to which the writ was returnable must be regarded as an appearance by the defendant, and it can not be said that no appearance had been entered by him at the time the cause was continued, and the continuance did not have the effect of a discontinuance.

The case was so far within the control of the court, at the term to which it was continued, that it could then appoint a guardian *ad litem* and proceed with the cause upon its merits to final judgment.

The case of *Barber* v. *Graves,* 18th Vt. 290, is in point. In that case the suit was commenced before a justice of the peace; the infant appeared by an attorney; he was there defeated; he appealed to the county court where he appeared by an attorney and was again defeated. The judgment was reversed on writ of error, and the cause remanded to the county court where a guardian *ad litem* was for the first time appointed, who moved to dismiss the cause and the denial of the motion by the county court was, by this Court, held correct.

Judgment affirmed, and cause remanded.

JENNIE P. SARGOOD *v.* EUGENE E. SARGOOD.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Opinion filed July 22, 1905.

Divorce—Grounds—Petitionee Serving Sentence in State's Prison—V. S. 2674, 5274.

Under that subdivision of V. S. 2674, which provides that a divorce may be decreed when either party is sentenced to confinement in the State's prison for three years or more, etc., the term of the sentence fixed by the court controls, regardless of the fact that, under V. S. 5274, such prisoner is entitled to a deduction from the term of his sentence of five days for each month of good behavior.

PETITION FOR DIVORCE. Heard at the December Term, 1904, Bennington County, *Powers,* J., presiding. Divorce granted. The petitionee excepted. The opinion states the case. See *State* v. *Sargood and Doyle, ante,* 80.

J. K. Batchelder for the petitionee.

J. J. Shakshober for the petitioner.

The term of the sentence fixed by the court controls, regardless of V. S. 5274. *Oliver* v. *Oliver,* 169 Mass. 592; *Cone* v. *Cone,* 58 N. H. 152.

START, J. The petitionee had been sentenced to confinement at hard labor in the State's prison for a term not less than three and one-half years nor more than four and one-half years, and was confined in State's prison at the time this cause was heard in the court below, and for this cause the petitioner was divorced from the petitionee under V. S. 2674, which provides, in part, that when either party is sentenced to confinement at hard labor in the State's prison for life, or for three years or more and is actually confined at the time of the trial, a divorce from the bonds of matrimony may be decreed.

The petitionee was sentenced at the December term, 1903, of the Bennington County Court, and the petitioner preferred her petition at the December term, 1904, of the same court, and the petitionee insists that under V. S. 5274 he was entitled to have deducted from his sentence five days for every month when no charges for misconduct were sustained against him, and that at the time of granting the divorce he was not sentenced to confinement at hard labor in the State's prison for three or more years and that a divorce from the bonds of matrimony could not be decreed under V. S. 2674.

This contention is not sound. The right of a party to a divorce from a party sentenced to confinement at hard labor in State's prison for three or more years is not, by V. S. 2674 or any other statute, made to depend upon the conduct of the party while confined in prison. Under the statute in question,

the term of the sentence fixed by the court and actual confinement at the time of the trial controls the authority of the court in decreeing a divorce.

The petitionee having been sentenced to confinement at hard labor in the State's prison for a term exceeding three years and being in actual confinement at the time the cause was heard in the court below, a divorce from the bonds of matrimony was lawfully decreed.

Judgment affirmed.

INDEX.

APPEAL AND ERROR.

See "HOMICIDE"; "JUSTICES OF THE PEACE"; "LIMITATION OF ACTIONS" § 2; "PAYMENT"; "PRINCIPAL AND AGENT"; "TRESPASS" § 2; "TRIAL" § 1.

§ 1. Decisions Reviewable.

Appeal from an order overruling a demurrer to a bill in equity not taken as confessed *held* unsustainable. *Wright & Valley* v. *Creamery Package Co.*, 17; *Taft* v. *Mossey's Admr.*, 165.

Questions, the decision of which involves a consideration of the evidence, cannot be reviewed by writ of error. *Nelson* v. *Marshall*, 44.

When, on a motion to set aside a verdict because of the misconduct of a juror, the county court heard testimony, denied the motion, but filed no statement of facts, the question cannot be reviewed on exception. *Patch Mfg. Co.* v. *Protection Lodge*, 294.

Whether relevant testimony is too remote in time or place is a preliminary question for the trial court, and will not ordinarily be revised. *State* v. *Bean*, 384.

The overruling of a motion to set aside a verdict as against the evidence is not reviewable. *Coolidge* v. *Ayers*, 448.

§ 2. Presentation and Reservation in Lower Court of Grounds of Review.

Defendant *held* not entitled to raise general questions as to the admissibility of evidence by exceptions to the report of a referee; no evidence having been admitted against defendant's objection except that relating to a single item sued for. *Holt* v. *Howard*, 49.

A general exception to the charge on a specified subject is bad unless the charge on that subject is wholly unsound. *State* v. *Sargood*, 80.

V. S. 1629, authorizing exceptions to be reviewed by the Supreme Court before final judgment does not apply to suits in chancery. *Taft* v. *Mossey's Admr.*, 165.

Defendant having merely excepted to the charge as given, *held* not entitled to complain of refusal and omission of further instructions. *Hathaway* v. *Goslant*, 199.

Allowing a leading question to be answered *held* not to be considered error, it not appearing it was not allowed as matter of discretion. *Ibid.*

The objection that a question is leading will not be considered by the Supreme Court, unless the record shows that objection to have been made below. *Ibid.*

In an action against a street railroad company for injuries to a passenger, plaintiff *held* not entitled to complain of the refusal of instructions inconsistent with her pleadings, evidence, and statement of counsel. *Fogarty* v. *Rutland St. Ry. Co.*, 438.

§ 3. Record and Proceedings Not in Record.

The question, submitted by a referee's report, whether certain evidence is inadmissible upon a specified ground, will be considered, though no exceptions to the report are filed. *Pollard* v. *Barrows*, 1.

All questions of variance are waived by a reference. *Ibid.*

On exceptions to the report of a referee, when the evidence is not reported except as contained in the referee's "minutes," the objection that various items were allowed without evidence will not be considered. *Holt* v. *Howard*, 49.

Remark of counsel in argument *held* not to be considered error, it not being shown that the evidence did not justify the inference drawn by him. *Hathaway* v. *Goslant*, 199.

Rulings *held* not to be considered erroneous; the transcript of evidence referred to in the bill of exceptions, and by it made a part thereof, not being furnished the Court. *Ibid.*

§ 4. Review.

Plaintiff, in view of his claims at the trial, *held* not entitled to claim in the Supreme Court that defendant was not a mutual company. *Wilson* v. *Mut. Fire Ins. Co.*, 28.

Where a conspiracy is proved, and both respondents are convicted, erroneous instructions with reference to their separate convictions were harmless, when the instructions touching a joint conviction were proper. *State* v. *Sargood*, 80.

Defendant *held* not prejudiced by plaintiff's testimony as to remarks of defendant when plaintiff refused to talk on the subject of settlement. *Hathaway* v. *Goslant*, 199.

Delay in directing plaintiff to elect between counts for the same acts of trespass *held* not prejudicial. *Ibid.*

In an action against a lodge of machinists' union for damages arising from an interference with plaintiff's business in pursuance of a conspiracy, a modification of an instruction as to the presumption that might be drawn from a suppression of evidence by defendant *held* not prejudicial. *Patch Mfg. Co.* v. *Protection Lodge*, 294.

The admission of immaterial evidence does not vitiate, if it can be said not to have harmed the excepting party. *State* v. *Bean*, 384.

On a prosecution for murder respondent *held* not entitled to complain that the charge was erroneous, in that it limited the jury to a consideration of the matter solely as presented by the arguments of counsel. *Ibid.*

In trover by a bankrupt's trustee to recover for a piano, defendant [redacted] not harmed by an answer of the bankrupt to an objectionable question. *Coolidge* v. *Ayers*, 448.

§ 5. Determination and Disposition of Cause.

In an appeal in chancery, after the Supreme Court has sent down the mandate it has no further jurisdiction of the case, and cannot entertain a motion that the case be brought forward on its docket and continued. *Monahan* v. *Monahan*, 155.

In trespass for assault and battery, the error, if any, in permitting defendant to answer a certain question, *held* harmless as to defendant. *Coruth* v. *Jones*, 441.

ASSAULT AND BATTERY.

See "APPEAL AND ERROR" § 4; "RAPE"; "TRIAL" § 1.

§ 1. Civil Liability.

In trespass for assault and battery, certain evidence *held* admissible to show the subject-matter of the altercation between plaintiff and defendant preceding the assault, and when the controversy began and the nature of it. *Coruth* v. *Jones*, 441.

In trespass for assault and battery, evidence of defendant's reputation as peaceable and law-abiding is not admissible. *Ibid.*

ARREST OF JUDGMENT.

See "LIMITATION OF ACTIONS" § 2.

ASSESSMENTS.

See "MUNICIPAL CORPORATIONS."

ASSUMPSIT, ACTION OF.

See "PAYMENT."

When money has been obtained by one person from another by fraud and without consideration, it may be recovered under the common count for money had and received. *Johnson* v. *Cate*, 218.

ATTORNEY AND CLIENT.

An attorney is not, by virtue of that relation alone, liable for court fees accruing in suits brought by him, but may become responsible for such fees by custom. *Russell's Ex'x* v. *Ferguson*, 433.

Evidence *held* insufficient to establish a custom by which attorneys entering a case in court became personally liable to the judge for accruing fees. *Ibid.*

AUCTIONS AND AUCTIONEERS.

Representation of an auctioneer that "everything should be as represented or no sale" *held* to apply to a mare represented to be sound. *Bailey* v. *Manley*, 157.

BANKRUPTCY.

See "APPEAL AND ERROR" § 4.

§ 1. Title, Rights, and Remedies of Trustee.

In trover by a bankrupt's trustee to recover for a piano, certain evidence *held* admissible. *Coolidge* v. *Ayers*, 448.

In trover by a bankrupt's trustee to recover for a piano, evidence considered and *held* to present a question for the jury whether defendant purchased the piano in good faith and without notice. *Ibid.*

§ 2. Rights, Remedies, and Discharge of Bankrupt.

The allegations in an alias close jail execution *held* insufficient to establish that the property converted was obtained by false pretences or false representation within U. S. Bankr. Act. *In Re Peterson*, 226.

BANKS AND BANKING.

See "CORPORATIONS" § 1.

BASTARDY.

See "CONTRACTS" § 1.

Marriage between a pregnant woman and her seducer is especially favored and encouraged by the law; and his contracts made in contemplation of such marriage are valid. *Jangraw* v. *Perkins*, 375.

BILLS AND NOTES.

See "EVIDENCE" § 5.

§1. Rights and Liabilities on Indorsement or Transfer.

When the payee transfers a note for valuable consideration, nothing more appearing, he impliedly warrants that the note is genuine and what it purports to be. *Miller* v. *Stebbins*, 183.

Facts *held* to justify, in an action on a check, a refusal to find that plaintiff was a *bona fide* holder. *Capital Sav. Bank & Trust Co.* v. *Bank*, 189.

§ 2. Actions.

A note pledged by the payee as collateral security cannot be collected by him while it is so pledged. *Miller* v. *Stebbins*, 183.

In an action on a note for borrowed money by the assignee of the payee, where the defendant claimed that she never signed the note, evidence of the payee's poverty at a certain time soon after it was given is inadmissible; the note having been pledged as collateral security before that date. *Ibid.*

It sufficiently appears that plaintiff paid valuable consideration for a note, when it appears that he purchased it from the payee after having loaned him money thereon as collateral security. *Ibid.*

In an action by an indorsee of a check which was obtained from defendant by the payee through fraud, the burden is on the indorsee to prove that he took the check in the usual course of business, for valuable consideration, and without knowledge of facts which impeached its validity between the original parties. *Capital Sav. Bank & Tr. Co.* v. *Bank*, 189.

In such case, if the circumstances would excite the suspicion of a prudent man as to the validity of the paper as between the antecedent parties to it, and the purchaser takes without inquiry, he is not a *bona fide* purchaser, though he paid value for it. *Ibid.*

In such case, whether the plaintiff, as a careful and prudent person, had reason to suspect, when he took the check, that it was invalid as between the antecedent parties, is a question of fact. *Ibid.*

BOUNDARIES.

Declarations as to boundaries, see "EVIDENCE" § 3.

BREACH OF THE PEACE.

Respondent being charged with intentionally driving his wagon against prosecutrix's carriage, evidence of prior threats by respondent to run into prosecutrix *held* admissible on the issue of intent. *State* v. *Atkins*, 215.

Evidence of prior threats of prosecutrix against respondent charged with driving against carriage of prosecutrix *held* admissible both as evidence in chief and as affecting her credibility. *Ibid.*

CARRIERS.

§ 1. Carriage of Passengers.

A common carrier cannot lawfully stipulate for exemption from liability, unless such exemption is just and reasonable in the eye of the law. *Sprigg's Admr.* v. *Rutland R. Co.*, 347.

It is against public policy for a common carrier to stipulate for indemnity against its own negligence in respect of its carriage of a passenger for hire. *Ibid.*

A caretaker accompanying cattle *held* a passenger for hire, for injuries to whom, resulting through its negligence, the railroad could not relieve itself by stipulations in its contract of carriage. *Ibid.*

CASES.

(Specially Approved, Criticised or Distinguished.)

Baker v. *Sherman*, 73 Vt. 26. (Explained) *Baker* v. *Sherman*, 167.

Frink's Admr. v. *Brotherhood, etc. Co.* (Distinguished) *Wilson* v. *Ins. Co.*, 28.

Gillis v. *West. Union Tel. Co.*, 61 Vt. 461. (Approved) *Sprigg's Admr.* v. *Rut. R. Co.*, 347.

Kimball v. *Rut. & Bur. R. Co.*, 26 Vt. 247. (Distinguished) *Sprigg's Admr.* v. *Rut. R. Co.*, 347.

Pierson v. *Gale, et al.*, 8 Vt. 509. (Distinguished) *Goodell* v. *Tower, et al.*, 61.
Squires v. *Squires*, 53 Vt. 20. (Approved) *Sawyer* v. *Churchill*, 273.
State v. *Parker*, 26 Vt. 357. (Approved) *State* v. *Scampini*, 92.
State v. *Sommers*, 3 Vt. 156. (Approved) *State* v. *Scampini*, 92.
Tarbell v. *R. R. Co.*, 73 Vt. 347. (Distinguished) *Osgood* v. *R. R. Co.*, 334.
Tarbell v. *Rut. R. R. Co.*, 73 Vt. 347. (Approved) *Sprigg's Admr.* v. *Rut. R. Co.*, 347.

CHARGE.

See "APPEAL AND ERROR" § 4; "CRIMINAL LAW" § 5; "HOMICIDE"; "TRIAL" § 2.

CHATTEL MORTGAGES.

§ 1. Removal or Transfer of Property by Mortgagor.

Under V. S. 2260, the "person injured" by the sale of mortgaged property without the consent of the mortgagee may be the mortgagee, or his assigns, or the vendee of the mortgagor. *Colston* v. *Bean*, 40.

Verbal permission to sell mortgaged personal property given by mortgagee to mortgagor, operates as a release of the mortgage. *Ibid.*

In an action against a chattel mortgagor for the alleged fraudulent sale of the property to the plaintiff, an instruction that the mortgagee's verbal permission to defendant was no defence *held* error. *Ibid.*

CONSPIRACY.

See "APPEAL AND ERROR" § 4; "CRIMINAL LAW" § 4; "TRIAL" § 2.

§ 1. Civil Liability.

Every person entering into a conspiracy is a party to all acts done by any of his co-conspirators, either before or afterwards, in furtherance of the common design. *Patch Mfg. Co.* v. *Protection Lodge*, 294.

Declarations made by one conspirator pursuant and in furtherance of the common object are admissible against all, when the combination is once established. *Ibid.*

The plaintiff may either first prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts and thus prove the conspiracy. *Ibid.*

In an action against a lodge of a machinists' union for damages for interfering with plaintiff's business by means of a boycott, strike, etc., in pursuance of a conspiracy between defendant and others, certain evidence held admissible on the question of conspiracy. *Ibid.*

An instruction *held* properly refused, as ignoring the issue whether persons were kept from plaintiff's employment by means of intimidation. *Ibid.*

An instruction that plaintiff could not recover for damages arising from defendant's influence directly upon third persons *held* properly refused. *Ibid.*

The fact that certain papers purporting to emanate from defendant bore its seal *held* admissible as tending to show the source of the papers, although defendant was not a corporation. *Ibid.*

Certain evidence *held* competent, as tending to show that those who signed a communication to plaintiff were authorized to do so by defendant. *Ibid.*

Certain evidence *held* to warrant an inference that defendant promoted the distribution of "stickers" relative to the strike. *Ibid.*

The fact of a common design existing between the different associations with whom defendant is alleged to have conspired makes the records of the other associations the records of defendant, provided the conspiracy is proved. *Ibid.*

§ 2. **Criminal Responsibility.**

In a prosecution for poisoning colts, refusal of a request that both defendants could not be convicted, unless there was a concert of action or common understanding *held* not error. *State* v. *Sargood*, 80.

CONSTITUTIONAL LAW.

§ 1. Construction, Operation, and Enforcement of Constitutional Provisions.

Under No. 90, Acts 1902, one who unlawfully sells liquor is guilty, regardless of whether license commissioners have been appointed under § 7, and hence he cannot assail the constitutionality of § 7. *State* v. *Scampini*, 92.

The constitutionality of an act cannot be contested by one whose rights it does not affect. *Ibid.*

The decisions of the U. S. Supreme Court are binding on state courts on questions arising under the U. S. Constitution. *Ibid.*

Courts will not pass upon the constitutionality of a statute, unless it is necessary to do so in order to finally determine the case. *Blanchard* v. *City of Barre*, 420.

§ 2. Distribution of Governmental Powers and Functions.

No. 90, Acts 1902, relative to intoxicating liquors, which provides for a referendum, does not thereby unconstitutionally delegate legislative powers to the people. *State* v. *Scampini*, 92.

§ 3. Equal Protection of Laws.

In so far as § 21, No. 90, Acts 1902, relative to traffic in intoxicating liquors, discriminates in favor of farmers and manufacturers, it is repugnant to U. S. Const. Amend. 14, but the act is not thereby rendered totally void. *State* v. *Scampini*, 92.

When a part of a statute is unconstitutional, the statute is not thereby rendered totally void unless all its provisions are so related that it cannot be presumed that the Legislature would have enacted one provision without the other. *Ibid.*

§ 4. Due Process of Law.

No. 49, Acts 1896, authorizing a court of chancery in its discretion to permit a married woman to convey her real estate by separate deed, *held* unconstitutional, as depriving the husband of his property without due process of law. *Hubbard* v. *Hubbard*, 73.

CONTRACTS.

§ 1. Requisites and Validity.

The test whether a demand connected with an illegal transaction can be enforced in equity is whether the orator requires the aid of the illegal transaction to establish his case. *Monahan* v. *Monahan*, 133.

An orator, seeking to impress certain securities with a trust, held not to be denied relief because of a fraudulent purpose to avoid taxation by placing the securities in defendant's name; the issue made by the pleadings being in respect of the title to the property, without reference to said fraudulent purpose. *Ibid.*

The doctrine as to enforcing the legal part of a contract, though another part thereof is illegal, determined. *Osgood* v. *C. V. Ry. Co.*, 334.

A provision of a contract whereby a railroad company was indemnified against certain negligence *held* not unenforceable under V. S. 3924. *Ibid.*

A portion of a contract whereby a railroad company was indemnified against certain negligence *held* not unenforceable, as against public policy. *Ibid.*

A contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society. *Ibid.*

A mortgage to secure the complainant in bastardy and her child, on her consent to dismiss the proceedings and marry the putative father, *held* not contrary to public policy. *Jangraw* v. *Perkins*, 375.

§ 2. **Construction and Operation.**

The phrase "to wit" in a recital in a written contract, referring to a date, has no materiality. *Sawyer* v. *Churchill*, 273.

Contract limiting carrier's liability for damages to cattle and for injury to caretaker *held* divisible as to the cattle and the caretaker. *Sprigg's Admr.* v. *Rutland R. Co.*, 347.

Contract for shipment of cattle and subsequent contract for caretaker to accompany the cattle *held* to constitute one contract, supported by the same consideration. *Ibid.*

§ 3. **Modification and Merger.**

When a party to a valid contract, having broken it, consents to perform on terms more favorable to himself, the modified contract, when performed, is binding on both parties. *Agel & Levin* v. *F. R. Patch Mfg. Co.*, 13.

When a contract has been reduced to writing, not under seal, it is competent for the parties, by a subsequent oral agreement, to vary or qualify any of its terms. *Frost* v. *Ins. Co.*, 407.

CORPORATIONS.

See "INSURANCE" § 2.

§ 1. **Capital Stock and Dividends.**

Statute of Limitations *held* not to run in favor of a corporation acquiring a subsequent lien on the stock pledged, as against the

pledgee's right to enforce the pledge. *White River Sav. Bank* v. *Capital Sav. Bank*, 123.

When pledged stock is subject to a second lien, the pledgee is not entitled to have the stock transferred to him, but only to have it sold under the prayer for general relief. *Ibid.*

Facts *held* to justify the maintenance of a bill in equity to enforce a pledge. *Ibid.*

The necessity of making a pledgor a party to a suit to foreclose the pledge *held* obviated by the filing of his consent that the pledge might be sold. *Ibid.*

The pledgee of certain corporate stock *held* not barred by laches from enforcing the same. *Ibid.*

A corporation, with notice of the pledge of certain of its stock, held bound to respect the right of the pledgee, though the transfer was not registered. *Ibid.*

Under V. S. 3689, a pledgee of stock, holding the certificate with power of transfer, is entitled to the equitable interest and legal right of the assignor, even before transfer on the books of the corporation. *Ibid.*

A provision of the charter of a corporation *held* not to authorize the refusal to register a transfer of which the corporation had notice before the stockholder became indebted to it. *Ibid.*

A corporation *held* entitled to a lien on stock, pledged, subject to the pledge, for credit extended to the pledgor after notice of the pledge. *Ibid.*

§ 2. Corporate Powers and Liabilities.

Notice by the treasurer of one corporation which was received by another, concerning a pledge of certain of the latter's stock, *held* to charge the latter with notice of the former's interest therein. *White River Sav. Bank* v. *Capital Sav. Bank*, 123.

COURTS.

See "APPEAL AND ERROR" § 5; "HUSBAND AND WIFE" § 2.

CRIMINAL LAW.

See "BREACH OF THE PEACE"; "SHERIFFS AND CONSTABLES"; "FALSE IMPRISONMENT" § 1; "FALSE PRETENCES"; "HOMICIDE"; "INDICTMENT AND INFORMATIONS"; "INTOXICATING LIQUORS" §§ 1, 2.

§ 1. Capacity to Commit and Responsibility for Crime.

To avoid responsibility for a criminal act on the ground of insanity it is not enough that the mind is so impaired that it cannot distinguish right from wrong; it must have no power to resist the insane impulse to commit the deed. *Rogers* v. *State*, 454.

On a petition for a new trial, after a conviction of murder, based upon newly discovered evidence of insanity, all the evidence examined and *held* that there is no reasonable doubt that petitioner at time of homicide had the mental ability to distinguish right from wrong, and to refrain from committing the crime. *Ibid.*

§ 2. Jurisdiction.

The offence of obtaining a check by false pretences *held* to have been committed in Vermont. *State* v. *Marshall*, 262.

§ 3. Preliminary Complaint.

The complaint and warrant constitute the precept, and when the complaint showed on its face that the justice who signed the warrant had no jurisdiction, the officer who served such precept cannot justify thereunder. *Goodell* v. *Tower*, 61.

§ 4. Evidence.

In a prosecution for horse theft, a voluntary statement by respondent as to his theft of certain horses held admissible without proof as to what horses were referred to. *State* v. *Blay*, 56.

Respondent's voluntary statement before a justice of the peace, on being informed of the charge against him and before he was warned, that he was "guilty"; *held* properly admitted against him. *Ibid.*

The fact that respondent committed a crime other than the one charged is admissible when it tends to prove a motive, plan, or purpose, though it does not appear that, when the crime charged was committed, the purpose to commit the other was already formed. *State* v. *Sargood et al.*, 80.

In a prosecution for poisoning certain colts, evidence that one respondent shortly thereafter attempted to poison H. and wife *held* admissible as tending to prove motive for the crime charged. *Ibid.*

In a prosecution for poisoning certain colts belong to B. evidence of B's son-in-law as to conversation with respondent in which the latter stated that he would get even with B. *held* admissible. *Ibid.*

In a joint prosecution of two for poisoning certain colts, when the State claims that the respondent who did the poisoning acted as

the tool of the other, evidence that the former stated that he got liquor from the other respondent who did not dare to refuse him anything, is admissible against the respondent who is claimed to have said so. *Ibid.*

Courts are bound to take notice of every public statute, and of the facts therein recited or stated. *State* v. *Scampini*, 92.

In a prosecution for larceny of a team, evidence that, while respondent had possession of the team, he stated that it had been hired is admissible in his favor. *State* v. *White*, 241.

In a prosecution for obtaining a check by false pretences, a letter written by the respondent to the prosecutor requesting him to send another draft, and said draft sent in compliance therewith, *held* admissible. *State* v. *Marshall*, 262.

In such prosecution, when the respondent had referred to the book of a commercial agency as to the financial standing of the party personated, it was proper to admit in evidence the book of such agency which was current at the time of the false pretence. *Ibid.*

When several crimes form a part of one transaction and are part of the same plan, they may be shown in evidence. *Ibid*, and see *State* v. *Bean*, 384.

On a prosecution for murder certain evidence *held* corroborative of that of a witness as to a conspiracy between himself and respondent to kill deceased. *State* v. *Bean*, 384.

On a prosecution for murder, certain evidence of the State as to experiment in identifying a person through a window *held* admissible. *Ibid.*

On a prosecution for murder, *held* proper for the State to prove an alibi for a certain witness. *Ibid.*

Evidence of hereditary insanity is cumulative evidence only, and not admissible, unless other evidence tends to show insanity in the person whose mental condition is in issue. *Rogers* v. *State*, 454.

The mere facts that a schoolgirl is mentally weak, of a very nervous and excitable temperament, and is the butt of ridicule on account of her peculiarities in dress have no tendency to show insanity. *Ibid.*

§ 5. Trial.

The appearance of a witness on the stand may always be considered by the jury, and counsel may properly comment thereon in argument. *State* v. *Clark*, 10.

In a prosecution for horse theft, it was not error for the court to omit to define the term "reasonable doubt." *State* v. *Blay*, 56.

In a prosecution under an information consisting of two counts charging separate offences, whether the State shall be required to elect on which count it will stand is discretionary with the trial court. *State* v. *Darling*, 67.

In such case failure to charge that all the evidence should be considered under each count is not error. *Ibid.*

In such case the refusal of the court to require the State to elect on which count it will stand was not an improper exercise of discretion, it not appearing that respondent was embarrassed thereby. *Ibid.*

Refusal of a request to charge on the weight of an admission made by a respondent to a detective *held* not error. *State* v. *Sargood*, 80.

§ 6. Punishment.

Where an information contained two counts and charged two offences of the same nature, and the court could impose any fine not less than $300 for one offence, upon a verdict of "guilty on both counts," a single judgment and sentence to pay a fine of $600 was not objectionable as cumulative. *State* v. *Darling*, 67.

CUSTOMS AND USAGES.

See "ATTORNEY AND CLIENT."

A custom in order to affect the rights of parties must be certain, uniform, and notorious. *Russell's Ex'x* v. *Ferguson*, 433.

DAMAGES.

See "REPLEVIN"; "TRESPASS" § 2.

DEEDS.

See "EASEMENTS."

§ 1. Construction and Operation.

Though the strict office of an "exception" in a deed is to exempt from its operation something in *esse* and part of the thing granted, while a reservation creates in favor of the grantor some new right out of the thing granted, yet a clause in a deed intended to create an exception will have that effect, though the word reservation is used. *Dee* v. *King*, 230.

Technical words of limitation are not applicable to an exception in a deed, for the part excepted remains in the grantor as of his former title. *Ibid.*

DEER.

See "GAME LAWS."

DIVORCE.

Under V. S. 2674 a wife is entitled to a divorce when her husband is sentenced to confinement in State's prison for three years or more, regardless of the fact that, under V. S. 5274, such prisoner is entitled to a deduction of five days for each month of good behavior. *Sargood* v. *Sargood*, 498.

EASEMENTS.

See "DEEDS."

§ 1. Creation, Existence and Termination.

A clause in a deed *held* an exception of a way, which became an easement appurtenant to the land not granted, and passed with it. *Dee* v. *King*, 230.

A right of way *held* to attach to every part of the land to which it is appurtenant, though it may go into the possession of several persons. *Ibid.*

There are *quasi easements*, such as a way used by the owner of land over one portion thereof to the convenient enjoyment of another portion, though there has never been any separate ownership of the *quasi* dominant and *quasi* servient tenements. *Ibid.*

The owner of land over which there is a *quasi* easement, in conveying the land, may treat such *quasi* easement as a thing in *esse* and part of the estate granted, and may except it from the operation of the deed. *Ibid.*

EQUITY.

See "CONTRACTS" § 1; "MUNICIPAL CORPORATIONS"; "WILLS" § 2.

§ 1. Pleading.

When a demurrer, incorporated in an answer, was heard and overruled and no appeal taken, and later, on hearing on an agreed statement, the bill was dismissed and an appeal taken, *held* that the benefit of the demurrer was impliedly reserved to defendant. *White River Sav. Bank* v. *Capital Sav. Bank*, 123.

EVIDENCE.

See "ASSAULT AND BATTERY"; "BILLS AND NOTES" § 2; "BREACH OF THE PEACE"; "CONSPIRACY"; "CRIMINAL LAW" § 4; "FRAUDS, STATUTE OF"; "HOMICIDE"; "INSURANCE" § 4; "LANDLORD AND TENANT"; "LARCENY"; "PAYMENT"; "PRINCIPAL AND AGENT"; "TRESPASS" § 2; "TRIAL" § 2; "WILLS" § 1.

§ 1. Presumptions.

The presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden. *Patch Mfg. Co.* v. *Protection Lodge*, 294.

In the trial of a case, a legal presumption should be used as a piece of evidence, and weighed as such, in behalf of the party in whose favor it operates, regardless of whether it arises from evidence, or exists independently of evidence. *In Re Cowdry's Will*, 359.

§ 2. Relevancy, Materiality, and Competency.

The appearance of a witness on the stand may always be considered by the jury, and counsel may properly argue concerning it. *State* v. *Clark*, 10.

§ 3. Declarations.

Declaration of deceased person, made when he owned the land, *held* admissible to show boundary. *Hathaway* v. *Goslant*, 199.

Such declarations may be received in evidence, though they are not a part of the *res gestae;* and their admission is not dependent on whether they accompany and give character to some act not affecting declarant's title. *Ibid.*

When declarations of a party are given in evidence against him, all that he said upon the subject at the same time must be received and weighed. *State* v. *Bean*, 384.

The failure to assert a fact, when it would have been natural to assert it, amounts to an assertion of the non-existence of the fact. *Coolidge* v. *Ayers*, 448.

§ 4. Hearsay.

The hearsay rule excludes statements from medical books on insanity. *Rogers* v. *State*, 454.

§ 5. Documentary Evidence.

Whether the books of a decedent which show promissory notes charged therein against claimant are admissible in favor of the estate depends upon the character of the page where the items are charged, and the course of business between the parties. *Freehart* v. *Stanford's* Est. 36.

Evidence *held* inadmissible to show a course of dealing by which notes were charged as items of a book account. *Ibid.*

The exclusion of decedent's account book, offered to prove an indebtedness evidenced by certain notes *held* not error. *Ibid.*

A referee *held* entitled to have the contents of certain books used by a witness to refresh his recollection disclosed and shown to him. *Holt* v. *Howard*, 49.

§ 6. Opinion Evidence.

A non-expert witness cannot give his opinion, unless he first state the observations he has made upon which he bases his opinion. *Rogers* v. *State*, 454.

Opinion of experts are not to be received unless based upon facts testified to by themselves or by others. *Ibid.*

EXCEPTIONS, BILL OF.

See "APPEAL AND ERROR" § § 1, 2; "NEW TRIAL".

A statement signed as a bill of exceptions is a mere nullity unless seasonably filed. *Nelson* v. *Marshall*, 44.

FALSE IMPRISONMENT.

§ 1. Civil Liability.

In a suit for false imprisonment, plaintiff is entitled to recover for loss of time and for mental suffering, though not specifically alleged. *Goodell* v. *Tower*, 61.

Where the person signing the complaint on which a criminal prosecution is based was not authorized to do so, such person, together with the justice issuing the warrant and the officer serving the same, are liable for false imprisonment. *Ibid.*

That a justice had jurisdiction of the offence for which plaintiff was arrested, and directed an officer to serve a warrant based on a complaint insufficient on its face to confer jurisdiction on the justice, *held* no defence to the officer's liability for false imprisonment. *Ibid.*

A justice of the peace, having issued a warrant for plaintiff's arrest on a complaint which was insufficient to confer jurisdiction of the subject-matter, *held* personally liable for false imprisonment. *Ibid.*

Facts reviewed, and held to show a sufficient restraint of plaintiff's liberty by an officer to constitute false imprisonment. *Ibid.*

Every restraint upon a man's liberty is, in the eye of the law, an imprisonment. *Ibid.*

FALSE PRETENCES.

The false personation of another with intent thereby to fraudulently obtain property, is a "false pretence" within V. S. 4960. *State* v. *Marshall*, 262.

An information alleging that the respondent, by falsely personating a person to whom a bank check was intended to be delivered, fraudulently obtained said check, charges an offence under V. S. 4959, and also under V. S. 4960. *Ibid.*

Facts *held* sufficient to warrant a conviction under V. S. 4960. *Ibid.*

FRAUDS, STATUTE OF.

See "LANDLORD AND TENANT."

§ 1. Pleading, Evidence, and Trial.

When evidence obnoxious to the Statute of Frauds is received without objection, the statute is waived. *Holt* v. *Howard*, 49.

GAME LAWS.

A deer having no horns protruding through the skin is not a deer "having horns" within the statute prohibiting the killing of wild deer not having horns. *State* v. *St. John*, 175.

When it is undisputed that a deer had horns only to the extent of bunches which did not protrude through the skin, whether these bunches were "horns" within the meaning of the statute prohibiting the killing of wild deer not having horns is a question for the court. *Ibid.*

GUARDIAN AD LITEM.

See "INFANTS."

HABEAS CORPUS.

See "BANKRUPTCY" § 2.

When the imprisonment of the relator is justified solely by virtue of a certified execution, the burden is on the judgment creditors to show that the judgment is a liability of a class not affected by a discharge in bankruptcy granted the relator under U. S. Bankr. Act. *In Re Peterson*, 226.

HOMICIDE.

See "CRIMINAL LAW" § 4; "WITNESSES" § 3.

On a prosecution for murder, certain evidence *held* properly admitted as tending to connect respondent with the stake with which it was claimed the fatal blow was struck. *State* v. *Bean*, 384.

On a prosecution for murder *held* proper to permit a witness to testify that respondent gave him money to use in acting as a detective in spying upon deceased, and that he procured it by means of a certain order. *Ibid.*

On a prosecution for murder, evidence as to certain statements of respondent *held* not open to the objection that they called for statements made in answer to a confidential inquiry. *Ibid.*

On a prosecution for murder, evidence as to certain remarks of respondent *held* admissible as tending to show that respondent was brooding over those matters from which it was claimed the motive arose. *Ibid.*

Evidence of prior attempts of respondent to commit the crime with which he is charged is competent against him, though he did not commit the crime by the same means. *Ibid.*

On a prosecution for murder, certain evidence held so devoid of significance that its admission was harmless. *Ibid.*

On a prosecution for murder the court's instructions on the theory of accidental death *held* not erroneous. *Ibid.*

HUSBAND AND WIFE.

See "CONSTITUTIONAL LAW" § 4; "PAUPERS" § 1; "SPECIFIC PERFORMANCE"; "WITNESSES" § 1.

§ 1. Mutual Rights, Duties and Liabilities.

The fact that a wife assists her husband in caring for money which is the product of their joint labor does not make any part of it her property. *Monahan* v. *Monahan*, 133.

Money earned by a wife during coverture belongs to her husband, in the absence of an agreement to the contrary. *Ibid.*

The widow's waiver contemplated by V. S. 2532 is of some provision the benefit of which she is to get upon or after her husband's death. *Sawyer* v. *Churchill*, 273.

§ 2. **Marriage Settlements.**

Recital in a contract between husband and wife purporting to release to the husband's children by a former wife any claim against the husband's estate which the contracting wife might have as his widow, *held* invalid, because a former provision of the contract had exhausted the consideration on which it was based. *Sawyer* v. *Churchill*, 273.

§ 3. **Conveyances, Contracts, and Other Transactions Between Husband and Wife.**

Deposits in a bank in the name of the wife, which was consistent with the manner in which the husband and wife transacted business, did not change the ownership from husband to wife. *Monahan* v. *Monahan*, 133.

The *prima facie* inference of a gift arising from such deposit of the husband's money with his consent, may be rebutted by parol evidence. *Ibid.*

Courts of equity require clear and incontrovertible evidence to establish gifts by husband to wife. *Ibid.*

INDICTMENT AND INFORMATION.

§ 1. **Necessity of Indictment.**

Statutory rape is not punishable by imprisonment in State's prison more than 20 years. Hence a State's Attorney can prosecute for that offence by information. *State* v. *Leach*, 166.

§ 2. **Formal Requisites.**

In an information charging a statutory crime, a negative averment may be in the words of the statute, or in words of equivalent meaning. *State* v. *Scampini*, 92.

The technical certainty in alleging time and place, which is demanded in indictments for felonies, is not required in indictments for misdemeanors. *Ibid.*

In indictments negative averments need not be stated with time and place. *Ibid.*

INFANTS.

See "PAUPERS" § 1.

§ 1. Actions.

In an action against an infant, his appearance by attorney at the term to which the writ is returnable is an appearance by the infant, and at the term to which the case was continued the court has jurisdiction to appoint a guardian *ad litem* and to proceed with the case. *Sears* v. *Duling*, 496.

INSANE PERSONS.

See "CRIMINAL LAW" § § 1, 4.

INSURANCE.

See "APPEAL AND ERROR" § 4.

§ 1. Control and Regulation in General.

In an action on a policy of fire insurance issued by an insurer incorporated under the laws of a foreign country evidence *held* to show that a general agent, into whose hands the adjustment of the loss was placed, was made the defendant's special agent with unlimited authority in respect of the adjustment. *Frost* v. *Ins. Co.* 407.

In an action on a policy of fire insurance issued by an insurer incorporated under the laws of a foreign country, evidence *held* to show that the acts of the managers at defendant's United States branch office, pertaining to the policy or the loss in question, were equivalent to the acts of the company itself. *Ibid.*

§ 2. Insurance Companies.

Provisions attached to the policy issued by defendant and purporting to be its by-laws, *held*, in an action on the policy, to be considered its by-laws till impeached. *Wilson* v. *Ins. Co.* 28.

A member of a mutual company is presumed to know its by-laws, and is bound thereby. *Ibid.*

The term "steam farm engine" in a fire insurance policy *held* to cover any steam engine adapted to farm uses. *Ibid.*

§ 3. Insurance Agents and Brokers.

Provision of a policy of fire insurance as to evidence of authority of agent *held* to be for benefit and subject to waiver by insurer. *Frost* v. *Ins. Co.* 407.

§ 4. Notice and Proof of Loss.

Provision of policy of fire insurance relating to waivers *held* not applicable to waiver of proof of loss. *Frost* v. *Ins. Co.* 407.

Acts and declarations of agent appointed to adjust loss *held* admissible in action on policy, to show waiver of proof of loss. *Ibid.*

Provision in policy of fire insurance restricting power of agents of insurer as to waiver of proof of loss *held* to be for benefit of, and subject to waiver by, insurer. *Ibid.*

Denial of liability *held* a waiver of proof of loss, entitling insured to sue on policy at once. *Ibid.*

§ 5. Action on Policies.

In an action on a policy of fire insurance whether the agents who issued the policy were treated by the parties as the agents of defendant *held* a question for the jury. *Frost* v. *Ins. Co.* 407.

INTEREST.

In assumpsit on an open and current book account, interest should be allowed on annual balances. *Holt* v. *Howard*, 49.

INTOXICATING LIQUORS.

See "SHERIFFS AND CONSTABLES."

§ 1. Offences.

Under No. 90, Acts 1902, § § 68, 81, any person selling liquor without a license is liable to punishment under § 68. *State* v. *Darling*, 67.

Under § 68, Acts 1902, each separate sale of intoxicating liquor without a license is a separate offence. *Ibid.*

The fine prescribed by § 68, Acts 1902 of "not less that $300." is unlimited as to the amount, except for the minimum requirement. *Ibid.*

A person who unlawfully sells intoxicating liquor is liable to punishment under § 68, Acts 1902, regardless of whether the sale was made in a town which had voted "License." *Ibid.*

Two persons went to respondent's place to buy of him a bottle of whiskey, and when both were there they asked respondent for a bottle of whiskey, which respondent procured and handed to one of them who took it and paid for it. *Held* a joint sale. *Ibid.*

§ 2. Criminal Prosecutions.

Under No. 90, Acts 1902, evidence of a sale of any liquor defined by the act as intoxicating is admissible under an information charging the sale of intoxicating liquor without naming the kind. *State* v. *Scampini*, 92.

Information under § 68, No. 90, Acts 1902, relative to sales of liquor without a license *held* to sufficiently negative the fact of a license. *Ibid.*

An information charging the sale of liquors without first having procured a license is not defective in failing to allege that respondent "then and there" had no license. *Ibid.*

In an information for selling liquor without a license, in violation of No. 90, Acts 1902, the words "then in force," in an averment negativing a license, do not affect the force of the averment and are immaterial. *Ibid.*

When an information for selling liquor without a license contains a sufficient negation of the license, other negations for the same purpose are mere surplusage. *Ibid.*

An information against a wholesale liquor dealer, charging him with selling a pint of whiskey to one who did not have a license, sufficiently alleges that the sale was not at wholesale, and was in violation of No. 90, Acts 1902. *Ibid.*

An information against a wholesale liquor dealer, charging him with selling whiskey by retail, sufficiently charged a crime under No. 90, Acts 1902.

Under No. 90, Acts 1902, license commissioners have judicial power only in the matter of revocation of licenses, and it is not necessary, as a condition precedent to the institution of criminal proceedings against licensees for illegal selling, that preliminary proceedings be first instituted before the license commissioners. *Ibid.*

Under No. 90, Acts 1902, it is no defence to a seller without a license that the town did not vote "License," or that there were no license commissioners. *Ibid.*

Under § 114, No. 115, Acts 1904, a justice before whom plea of guilty of selling liquor is entered *held* to have implied authority to sentence offender to imprisonment. *Re Demarco*, 445.

JURISDICTION.

Of Supreme Court, See "APPEAL AND ERROR" § 5.

JUSTICE EJECTMENT.

See "LANDLORD AND TENANT."

JUSTICES OF THE PEACE.

See "FALSE IMPRISONMENT" § 1.

§ 1. Review of Proceedings.

Where there was nothing to show that justice's judgment was appealable, plaintiff's motion in county court to dismiss the appeal should be granted, regardless of whether the justice had jurisdiction. *Porter* v. *Bishop*, 163.

LANDLORD AND TENANT.

§ 1. Re-entry and Recovery of Possession by Landlord.

The mere delivery of the key by the tenant to the landlord does not entitle the landlord to enter and expel by force the tenant who continues in actual possession. *Griffin* v. *Martel*, 19.

In such case the delivery of the key gave the landlord, at most, only symbolical possession, and he must have actual peaceable possession to justify expelling the tenant with force. *Ibid.*

"Justice ejectment" does not lie unless the defendant is a technical lessee and all his right in the premises, both legal and equitable, has ceased. *Wheeler* v. *Wheeler*, 177.

In an action of "justice ejectment" brought on the ground that the lease has terminated by breach thereof, evidence is admissible that there was no lease, and that defendant took possession under a verbal contract to operate the farm for his mother during her life, when he was to have the place, and that she made a will giving it to him. *Ibid.*

Although notice to quit is not necessary to maintain "justice ejectment," yet, if the plaintiff tries the case upon the theory that she must give defendant reasonable time to quit, it is for the jury to say whether such notice was reasonable. *Ibid.*

In "justice ejectment," though there is no written agreement in respect of defendant's occupancy of the premises, the plaintiff cannot insist upon the Statute of Frauds. *Ibid.*

LARCENY.

See "CRIMINAL LAW" § 4.

§ 1. Prosecution and Punishment.

Respondent's felonious intent in a prosecution for stealing a horse *held* a question for the jury. *State* v. *Blay*, 56.

In a prosecution for larceny, extra judicial confessions, alone and uncorroborated are insufficient to establish the *corpus delicti*, but slight corroboration may be sufficient. *Ibid.*

LEASES.

See "Reformation of Instruments."

LIMITATION OF ACTIONS.

See "Corporations" § 1; "Trover and Conversion."

§ 1. Statute of Limitation.

There is no difference between the actions of assumpsit and book account, in respect of what items are barred by the Statute of Limitation. *Holt* v. *Howard*, 49.

Held that, when parties intended that all their business deal, except notes, should form items of an open and mutual account, such business deal will be so treated, in respect of the Statute of Limitations. *Ibid.*

§ 2. Computation of Period of Limitation.

Under V. S. 1214, an arrest of judgment is not final, and does not bar a subsequent action for the same cause. *Baker* v. *Sherman*, 167.

Where, on objection to the declaration after verdict, plaintiff elected to submit to an arrest of judgment, this did not preclude a new action for the same cause, under V. S. 1214. *Ibid.*

MALICIOUS PROSECUTION.

§ 1. Actions.

Declaration in an action for malicious suit *held* not bad for duplicity. *King* v. *Estabrooks*, 371.

In such action, want of probable cause is a question of law; and a declaration which charges merely the institution of the suit "without reasonable or probable cause of action" is bad on demurrer. *Ibid.*

In an action for malicious suit *held* that certain allegations in the declaration sufficiently impeach a judgment therein described to overcome its effect as proof of probable cause. *Ibid.*

MARRIAGE.

See "BASTARDY"; "CONTRACTS" § 1.

MASTER AND SERVANT.

§ 1. Master's Liability for Injuries to Servant.

Under the evidence, *held* that it was a question for the jury whether plaintiff, in removing tamping from drill holes in a quarry, assumed the risk of an unexploded charge. *McKane* v. *Marr & Gordon*, 7.

MORTGAGES.

See "CONTRACTS" § 1; "TROVER AND CONVERSION."

MUNICIPAL CORPORATIONS.

See "PAUPERS" § 2.

§ 1. Public Improvements.

Under charter of city of Barre, a determination by city council of the jurisdictional fact of the necessity of street paving *held* judicial in character. *Blanchard* v. *City of Barre*, 420.

Under charter of city of Barre, a resolution of city council relating to paving a certain street *held* not a determination of the necessity therefor. *Ibid.*

Under charter of city of Barre, a street paving assessment made pursuant to determination by street commissioners, acting under attempted delegated power from city council, *held* invalid. *Ibid.*

The power of a city to make a street paving assessment exists only when distinctly conferred by legislative authority, and must be exercised in the mode prescribed, and the assessment must affirmatively show on its face that it was made according to the prescribed rule. *Ibid.*

Nothing will be presumed in aid of the regularity of session proceedings. *Ibid.*

A street paving assessment, invalid under the charter of the city of Barre, *held* not to constitute a cloud on title, requiring interference of court of equity to remove. *Ibid.*

A bill to enjoin collection of street paving assessment and to remove same as a cloud on title, but not alleging fraud, orator *held* to have remedy at law. *Ibid.*

MOTIONS.

See "APPEAL AND ERROR" § 5; "JUSTICE OF THE PEACE."

NEW TRIAL.

See "LIMITATION OF ACTIONS" § 2.

When, after trial in county court, the defeated party is precluded from seasonably filing his bill of exceptions by the accident or mistake of the trial judge, he is entitled to a new trial, under V. S. 1662, regardless of merit of his exceptions. *Nelson* v. *Marshall*, 44.

Affidavits on a petition for a new trial on a charge of rape considered, and held insufficient to warrant the granting of the petition. *Lucia* v. *State*, 279.

On petition to Supreme Court for a new trial founded on newly discovered evidence, affidavits of petitioner and his counsel *held* insufficient to show the exercise of due diligence. *May* v. *State*, 330.

On petition to Supreme Court for a new trial in a criminal case, founded on newly discovered evidence, the evidence relied upon *held* cumulative evidence merely. *Ibid.*

A petition for a new trial founded on newly discovered evidence will not, ordinarily, be granted by the Supreme Court, where a motion for a new trial, based on the same affidavits, was made in county court and there heard and overruled. *Ibid.*

It is essential to the granting of such petition after such motion that an abuse of discretion of trial court be shown. *Ibid.*

On a petition for new trial after conviction of murder, based upon newly discovered evidence of petitioner's insanity, all the evidence examined and petition denied. *Rogers* v. *State*, 454.

On a petition for a new trial after conviction of murder, based on newly discovered evidence that a confessed accomplice, who had testified for the State, had since said that in his testimony "he lied and had to do it to save his neck," *held* that the Court is not warranted in saying that this statement referred to anything besides certain contradictory statements made by the accomplice on the trial. *Ibid.*

OFFICERS.

See "CRIMINAL LAW" § 3; "FALSE IMPRISONMENT" § 1.

PARTNERSHIP.

§ 1. Mutual Rights, Duties, and Liabilities of Partners.

Plaintiff *held* entitled to recover in an action of assumpsit in his own name the balance found due on a settlement between himself and defendant, which included a partnership indebtedness of defendant, which plaintiff had acquired. *Holt* v. *Howard*, 49.

PAUPERS.

§ 1. Residence.

In an action by one town against another for expenses incurred in the support of a pauper, facts *held* insufficient to show emancipation of a pauper while a minor, and hence that defendant was not liable for his support, because he had not resided in defendant town three years after attaining his majority. *South Burlington* v. *Cambridge*, 289.

A person cannot acquire a residence, within the meaning of our pauper law, unless he is *sui juris*. *Town of Jericho* v. *Town of Morristown*, 367.

A married woman living with her husband in a town *held* not to gain a residence within the pauper law, so as to make it liable to another town for support furnished her as a pauper after her husband's death. *Ibid.*

§ 2. Support, Services and Expenses.

A town *held* liable only for those services of a physician rendered to a poor person *after* a promise by its overseer of the poor to pay therefor. *Farmer* v. *Salisbury*, 161.

A promise by an overseer to pay for such services rendered prior to his being notified thereof is without consideration, and such services do not inure to the benefit of the town. *Ibid.*

PAYMENT.

§ 1. Recovery of Payments.

In an action for money paid because of defendant's false representation, the question of voluntary payment *held* not involved. *Johnson* v. *Cate*, 218.

Where plaintiff purchased property for a firm of which he was agent, and paid defendant therefor on the latter's false representation that the firm had not paid, it was immaterial to plaintiff's right to

recover such payment that he had guaranteed payment for the property. *Ibid.*

In an action for money paid, an instruction with reference to the weight of a receipted bill introduced in evidence *held* properly refused. *Ibid.*

PENALTIES.

See "PROCESS" § 1.

PLEADING.

See "CRIMINAL LAW" § 3; "EQUITY"; "FALSE PRETENCES"; "INDICTMENTS AND INFORMATIONS"; "INTOXICATING LIQUORS" § 2; "LIBEL AND SLANDER"; "MALICIOUS PROSECUTION"; "PROCESS" § 2.

§ 1. Amended and Supplemental Pleadings.

An amendment is permissible, unless it changes the form of action, or introduces a new cause of action. *Pollard* v. *Barrows*, 1.

In an action of trespass, when the case had been referred, and the referee reported that defendant had not trespassed on the premises described in the declaration, but did trespass on another part of plaintiff's close, the court properly allowed an amendment to make the description of the land trespassed upon correspond with the findings of the referee. *Ibid.*

§ 2. Issues, Proof, and Variance.

All questions of variance are waived by a reference. *Pollard* v. *Barrows*, 1.

PLEDGES.

See "BILLS AND NOTES" § 2; "CORPORATIONS" § 1.

The pledgee has only a special property in the pledge, the general property remains in the pledgor. *White River Sav. Bank* v. *Capital Sav. Bank*, 123.

A pledgee does not acquire an absolute title to the pledge by the failure of the pledgor to redeem within the time limited. *Ibid.*

A pledgee, on default of the pledgor has no right of strict foreclosure, but he may maintain a bill in equity in the nature of a foreclosure, and have a decree for a judicial sale of the property, or he may sell the pledge without judicial process, on reasonable notice to the pledgor. *Ibid.*

A pledgor's right to redeem, not limited by the contract, extends during his lifetime, and descends to his personal representatives, unless the pledgee call on him to redeem, or forecloses, in the meantime. *Ibid.*

PRINCIPAL AND AGENT.

§ 1. Rights and Liabilities as to Third Persons.

In an action for money paid for certain property, the evidence showing as matter of law that the sale was made to plaintiff's principals, requests to charge, submitting such issue to the jury, were properly refused. *Johnson* v. *Cate*, 218.

In an action for money paid by plaintiff for property purchased by him as agent for a firm, whether such transaction appeared on the firm's books *held* immaterial to defendant. *Ibid.*

In an action for money paid by an agent for property purchased on behalf of his principal, a request to charge that, if the transaction was as stated by defendant, the sale was to plaintiff's principals, and not to plaintiff, should have been given. *Ibid.*

When one sells goods to another whom he knows to be acting in the transaction as the agent of a known principal, the principal, and not the agent, is the purchaser. *Ibid.*

The powers of an agent are, *prima facie*, co-extensive with the business entrusted to his care, and will not be narrowed by limitation not communicated to the person with whom he deals. *Frost* v. *Ins. Co.*, 407.

PROCESS.

§ 1. Nature, Issuance, Requisites, and Validity.

In an action on penal statutes, the minute required by V. S. 1993 to be made upon the writ by the magistrate signing it, is no part of the writ itself; the minute must be made upon the perfected writ. *Brighton* v. *Kelsey*, 258.

The words, "Signed and dated at Brighton in the County of Essex this 7th day of June, 1904," written above the magistrate's signature to a writ in an action on a penal statute *held* not a compliance with V. S. 1993, and that the writ should be dismissed. *Ibid.*

§ 2. Service.

An officer's return on a writ cannot be falsified by a plea in abatement. *McDaniels* v. *DeGroot*, 160.

PUBLIC POLICY.

As affecting contracts, see "CONTRACTS" § 1; "CARRIERS."

RAILROADS.

See "CONTRACTS" § § 1, 2; "CARRIERS"; "STATUTES, CONSTRUCTION OF."

RAPE.

In a prosecution for an assault with intent to ravish a girl under the age of 16 years, respondent's intent *held* a question for the jury. *State* v. *Clark*, 10.

In such case the question of the girl's consent is immaterial. *Ibid.*

REASONABLE DOUBT.

See "CRIMINAL LAW" § 5.

REFERENCE.

§ 1. Referees and Proceedings.

A referee held entitled to have the contents of certain books used by a witness to refresh his memory disclosed and shown to him. *Holt* v. *Howard*, 49.

When, on an accounting, a referee found that certain items claimed by defendant were payments for things not charged in plaintiff's specification, such items were properly disallowed. *Ibid.*

All questions of variance are waived by a reference. *Pollard* v. *Barrows*, 1.

REFORMATION OF INSTRUMENTS.

Assignment of lease, drawn by mistake so as to include the assignor's claim against the land for support, construed to convey a leasehold interest only. *Hoyt* v. *Hoyt*, 244.

REPLEVIN.

In replevin for a heifer, wherein defendant prevails, he is entitled to recover the value of the use of the heifer during the period of her detention by plaintiff, without deduction for her increase of value during that time. *McGrath* v. *Wilder*, 431.

SALES.

See "INTOXICATING LIQUORS" § 1.

§ 1. Modification or Recission of Contract.

To rescind a contract of sale, the buyer need not make a manual tender of the property sold when the seller refuses to take it back. *Bailey* v. *Manley*, 157.

SEARCHES AND SEIZURES.

See "SHERIFFS AND CONSTABLES."

SECURITY.

"Security" is something which makes the enjoyment or enforcement of a right more secure. *Coolidge* v. *Ayers*, 448.

SET-OFF AND COUNTER CLAIM.

See "WILLS" § 2.

SHERIFFS AND CONSTABLES.

A ministerial officer is protected in the execution of process from a court of general jurisdiction, if jurisdiction appears on the face of the process. *Casselini* v. *Booth*, 225.

Illegal search warrant for liquor *held* no protection to the officer executing it. *Ibid.*

SPECIFIC PERFORMANCE.

Equity will not enforce specific performance of contracts between husband and wife which are tainted with an understanding contemporaneous with the marriage tending to effect a future separation. *Sawyer* v. *Churchill*, 273.

A decree of specific performance of a certain contract between husband and wife refused. *Ibid.*

STATUTES, CONSTRUCTION OF.

See "APPEAL AND ERROR"; "CHATTEL MORTGAGES"; "CONSTITUTIONAL LAW"; "CONTRACTS"; "CORPORATIONS"; "DIVORCE"; HUSBAND AND WIFE"; "INTOXICATING LIQUORS."

A statute unconstitutional in part may nevertheless be upheld as to its valid part, unless the good and bad portions are inseparably connected. *State* v. *Scampini*, 92.

Changes made in a revision of statutes will not be regarded as altering well settled law, unless it is clear that such was the intention. *Brighton* v. *Kelsey*, 258.

A penal statute is to be construed with reference to its spirit and reason; and a case which falls within its letter may not be within the statute because not within its spirit and reason. *Osgood* v. *C. V. Ry. Co.*, 334.

V. S. 3924, penalizing the negligence of an agent of a railroad company, whereby an injury is done, does not extend to injuries in which the public has no interest. *Ibid.*

Though penal statutes are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *In Re Demarco*, 445.

Every statute is understood to contain all such provisions as are necessary to effectuate its object; and what is implied in a statute is as much a part thereof as what is expressed. *Ibid.*

STATUTES CONSTRUED.

Acts 1894, No. 165. *Blanchard* v. *City of Barre*, 420.
Acts 1896, No. 49. *Hubbard* v. *Hubbard*, 73.
Acts 1896, No. 94. *State* v. *St. John*, 175.
Acts 1898, No. 46. *State* v. *Leach*, 166.
Acts 1898, No. 58. *Re Cowdry's Will*, 359.
Acts 1898, No. 118. *State* v. *Leach*, 166; *State* v. *Clark*, 10.
Acts 1902, No. 90, *State* v. *Scampini*, 92.
Acts 1902, No. 90, § 61. *Casselini* v. *Booth*, 255; *State* v. *Darling*, 67.
Acts 1902, No. 211, § 13. *Blanchard* v. *City of Barre*, 420.
Acts 1904, No. 115, § 114. *Re Demarco*, 445.
V. S. 1214. *Baker* v. *Sherman*, 167.
V. S. 1241. *Miller* v. *Stebbins*, 183.
V. S. 1298. *Porter* v. *Bishop*, 163.
V. S. 1560. *Wheeler* v. *Wheeler*, 177.
V. S. 1629. *Taft* v. *Mossey*, 165.
V. S. 1662. *May* v. *State*, 330.
V. S. 1662, 1664. *Nelson* v. *Marshall*, 44.
V. S. 1867. *State* v. *Leach*, 166.
V. S. 1693. *Hathaway* v. *Goslant*, 199.
V. S. 1751. *In Re Peterson*, 226.
V. S. 1993. *Town of Brighton* v. *Kelsey*, 258.
V. S. 2259. *Colston* v. *Bean*, 40.
V. S. 2262. *Colston* v. *Bean*, 40.

V. S. 2532. *Sawyer* v. *Churchill*, 273.
V. S. 2674. *Sargood* v. *Sargood*, 498.
V. S. 2760. *In Re Cowdry's Will*, 359.
V. S. 3924. *Osgood* v. *C. V. Ry. Co.*, 334.
V. S. 3689. *White River Sav. Bank* v. *Capital Sav. Bank*, 123.
V. S. 4908. *Holt* v. *Howard*, 49; *State* v. *Leach*, 166.
V. S. 4960. *State* v. *Marshall*, 262.
V. S. 5001. *Goodell* v. *Tower*, 61.
V. S. 5020. *Hathaway* v. *Goslant*, 199; *Pollard* v. *Barrows*, 1.
V. S. 5274. *Sargood* v. *Sargood*, 498.

STRIKES.

See "CONSPIRACY" § 1.

TOWNS.

See "PAUPERS" § 2.

TRADE UNIONS.

See "CONSPIRACY."

TRESPASS.

See "APPEAL AND ERROR" § 4; "FALSE IMPRISONMENT" § 1.

§ 1. Acts Constituting Trespass, and Liability Therefor.

Where there is an unlawful invasion by force of one's possession of goods, which were taken and carried away without the possessor's consent, the question, in an action of trespass and trover, whether there was a *conversion* of the goods, is immaterial. *Griffin* v. *Martel*, 19.

When entry is made with force and strong hand on premises in actual possession of another, those making the entry have no right, in order to remain, to assault the person in possession, but are bound to depart and leave the possessor in his former state. *Ibid.*

When defendants with force invade a store in the actual possession of plaintiff, their entry is not peaceable, though made without assaulting the plaintiff, and though they are entitled to possession; and being thus in they have no right to remain. *Ibid.*

§ 2. Actions.

A referee *held* to have properly admitted evidence of trespass on a part of plaintiff's close other than that described in his declaration, defendants not being surprised, and the misdescription being curable by amendment. *Pollard* v. *Barrows*, 1.

Assisting in the service of a writ of replevin is not available as a defence in an action of trespass, where justification on that ground was not specially pleaded. *Griffin* v. *Martel*, 19.

Where plaintiff, in an action of trespass *de bonis*, testified that the goods were carelessly and negligently moved, and thereby greatly damaged, it was proper to deny defendant's motion for an order for a return of the goods in mitigation of damages. *Ibid.*

In an action of trespass *de bonis*, allowing plaintiff to show the value of his goods sixteen months before the taking *held* proper. *Ibid.*

The cost of goods is some evidence of their present value. *Ibid.*

Rejected evidence held not shown to have been material. *Hathaway* v. *Goslant*, 199.

Evidence in an action for damages for cutting trees *held* immaterial and irrelevant. *Ibid.*

V. S. 5020, which gives treble damages for cutting trees, creates no right of action, but only gives cumulative damages. *Ibid.*

TRIAL.

See "Game Laws"; "Witnesses" § 2.

§ 1. Reception of Evidence.

Objection to question *held* not to question qualification of witness. *Hathaway* v. *Goslant*, 199.

Rejection of defendant's offer to show the reason for a certain act held not to be considered error; it not appearing that the witness was not called by defendant, or that he stated in his offer what the witness would testify. *Ibid.*

In trespass for assault and battery, withdrawal by court of improperly admitted evidence from jury, and refusal to permit argument thereon by defendant's counsel, *held* not error. *Corruth* v. *Jones*, 441.

§ 2. Instruction to Jury.

Although a charge may contain some expressions which taken alone would be error yet if, as a whole, it is sound and there is no fair ground to say that the jury has been mislead, it ought to stand. *Patch Mfg. Co.* v. *Protection Lodge*, 294.

When a judge drops an expression, in the course of a long charge, so contrary to its whole theory and so plainly error as to force the impression of inadvertence, it is the duty of counsel to call attention to it, and not let it pass in reliance upon a general exception. *Ibid.*

Where, in an action for damages for conduct on the part of defendant in pursuance of a conspiracy, all the testimony received on behalf of plaintiff tended to show the conspiracy, there could be no complaint as to the order of proof. *Ibid.*

In an instruction as to the presumption that could be drawn from the fact that defendant "failed" to produce certain evidence in its possession, after having been notified to do so, the word "failed" is equivalent to the word "refused." *Ibid.*

An instruction *held* not to have amounted to telling the jury that the suppression of certain evidence by defendant was equivalent to a showing of the conspiracy. *Ibid.*

TROVER AND CONVERSION.

See "APPEAL AND ERROR" § 4.

Conversion imports an unlawful act, and mere nonfeasance is not enough. *Andrews* v. *Carl*, 172.

Defendant having come lawfully into possession of plaintiff's stray heifer, his failure to advertise same did not constitute a conversion so as to start the Statute of Limitation before demand and refusal. *Ibid.*

A judgment for damages in an action of trover does not necessarily imply that defendant therein obtained property by false pretences or false representations. *In Re Peterson*, 226.

The purchaser of a farm from a mortgagee who had acquired title by foreclosure *held*, in order to recover for conversion of hay cut by the lessee of the mortgagor after the foreclosure, bound to show it was cut after he bought the farm, or that he bought the hay. *Standlick* v. *Downing*, 382.

TRUSTS.

See "WILLS" § 2.

VARIANCE.

See "PLEADING" § 2; "TRESPASS" § 2.

WILLS.

§ 1. Testamentary Capacity.

A person who is adjudged a *non compos* and placed under guardianship is thereby rendered *prima facie* incompetent to make a will while the adjudication remains in force. *In Re Cowdry's Will*, 359.

But one who, under No. 58, Acts 1898, is merely adjudged incapable of taking care of his property is not *prima facie* incapable of making a will. *Ibid.*

The law presumes undue influence when a ward makes a will in favor of his guardian. *Ibid.*

This presumption establishes *prima facie* the existence of such undue influence so as to defeat the will, unless and until it is overcome by counter proof, and should be used as a piece of evidence in favor of the contestants. *Ibid.*

§ 2. Construction.

A father who assumed the support of himself and wife *held* to have released his son from an obligation, imposed upon the latter in a devise of land to support his father. *Hoyt* v. *Hoyt*, 244.

A beneficiary under a will, who is entitled to a life support out of property devised to his son on condition that the latter shall afford him such support, cannot convey away his right to support. *Ibid.*

Where property was devised to a son on condition that he would support his parents during their lives, and he failed to perform the trust, the proper remedy for the parents was a suit to foreclose the son's interest in the property. *Ibid.*

A devise of land to a son, on condition that he should support his parents during their lives, *held* a trust for the life support of the parents. *Ibid.*

A son who accepts a devise of property conditioned on furnishing support to his parents, cannot set off an indebtedness from his father to him against the amount due from him to his father under such obligation. *Ibid.*

WITNESSES.

See "EVIDENCE" § 2.

§ 1. Competency.

Where two defendants were jointly indicted and tried for the same offence the wife of either is incompetent to testify in their favor. *State* v. *Sargood*, 80.

Facts *held* not to make a wife her husband's agent, within V. S. 1214, so as to make her competent to testify in his behalf. *Miller* v. *Stebbins*, 183.

The payee of a note, who transferred it for valuable consideration, is interested in the result of an action thereon by the assignee against the maker who claims it to be a forgery, so that his wife is not a competent witness as to the transaction of the making of the note. *Ibid.*

Orator, by calling and using defendant as a witness as to acts of a decedent, *held* to have waived his incompetency, so that he could testify further on the question in his own behalf. *Dee* v. *King*, 230.

§ 2. **Examination.**

Questions on cross-examination *held* properly refused, in view of the direct examination. *Hathaway* v. *Goslant*, 199.

§ 3. **Credibility, Impeachment, Contradiction and Corroboration.**

The extent of cross-examination to test the accuracy, veracity, or credibility of a witness, or to impeach his character is largely in the discretion of the trial court. *Hathaway* v. *Goslant*, 199.

Questions on cross-examination *held* proper for the purpose of discrediting witness. *Ibid.*

Where, on a prosecution for murder, respondent introduced evidence to show that a witness for the State was influenced by threats of imprisonment to testify to a former conspiracy between himself and respondent to kill deceased, it was competent for the State to show that he made similar statements before the alleged threats. *State* v. *Bean*, 384.

No foundation need be laid for the impeachment of a party. *Coolidge* v. *Ayers*, 448.

WRITS.

See "PROCESS" § 1.

WRIT OF ERROR.

See "APPEAL AND ERROR" § 1.

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